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Supreme Court, U.S.
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In The

Supreme Court of the United States

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ERIC B. REINHOLZ,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

◆

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A SANITIZED *FRANKS V. DELAWARE* AFFIDAVIT SET FORTH SUFFICIENT FACTS TO JUSTIFY ISSUANCE WHEN THE APPELLATE COURT'S SANITIZED VERSION IS INCONSISTENT WITH PREVIOUS RULINGS ON STANDING, PARTICULARITY, AND BREADTH OF BAD FAITH.

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PETITION FOR A WRIT OF CERTIORARI

Eric B. Reinholz respectfully petitions for a writ of certiorari to review the opinion and judgment entered by the United States Court of Appeals for the Eighth Circuit on March 29, 2001.

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OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued an opinion affirming in part and reversing in part the district court's order suppressing evidence in this matter. The matter is reported as *United States v. Reinholz and Chevalier,* 245 F.3d 765 (8th Cir. 2001). Mr. Reinholz filed a Petition for Rehearing En Banc. It was denied on May 8, 2001, in an unpublished opinion. Both of the circuit court opinions and the district court's opinion can be found in the appendix to this petition.

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JURISDICTION

The United States District Court for the District of Nebraska had jurisdiction over this case pursuant to 18 U.S.C. §3231 and 21 U.S.C. §§846 and 856. The United States Court of Appeals for the Eighth Circuit had jurisdiction pursuant to 18 U.S.C. §3731, which provides it for an interlocutory appeal. Mr. Reinholz invokes the United States Supreme Court's jurisdiction pursuant to 28 U.S.C. §1254(1). This petition for writ of certiorari is timely filed pursuant to an Order granting a ten-day extension signed by the Honorable Supreme Court Justice Clarence Thomas.

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CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation."

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STATEMENT OF THE CASE

A. Summary of the Proceedings

On November 20, 1998, Officer Stephen Podany of the Omaha Police Department obtained a search warrant to search the residence of Eric Reinholz. Reinholz lived with Margaret Chevalier. The Affiant believed that Reinholz was operating a clandestine methamphetamine lab. Reinholz filed an Omnibus Motion to Suppress the search, statements, the arrest, and the search of two automobiles. Reinholz sought a hearing pursuant to *Franks v. Delaware,* 438 U.S. 154 (1978). Chevalier filed similar motions, but the magistrate judge held that Chevalier had not met her burden to show standing as per *Franks v. Delaware*. Accordingly, for *Franks* related issues, Chevalier's counsel was not allowed to present evidence. Reinholz contended that the affidavit misrepresented information and omitted material facts from the affidavit having to do with his involvement in the suspected illegal activities.

On September 16, 1999, the magistrate issued his recommendation. He recommended that a critical paragraph of the affidavit be excised. However, even with an excised affidavit, he recommended that there was probable cause to issue the search warrant. He recommended that Mr. Reinholz and Ms. Chevalier's statements be suppressed as well as the search of one of the automobiles. Both sides objected to the magistrate's recommendations.

On November 19, 1999, the district court sustained the petitioner's objections as to sufficiency of probable cause to issue a warrant based on a solitary garbage pull and rejected all of the objections of the government. The order resulted in the suppression of all evidence and statements that the government would rely on at the time of trial.

On December 17, 1999, the government filed a Notice of Appeal. On March 29, 2001, the Court of Appeals affirmed in part and reversed in part. While the Eighth Circuit agreed that the affiant acted in bad faith when he misstated a critical portion of the affidavit, they found another portion of the affidavit (that was not a factor in the previous rulings) was the "critical link" (Ms. Chevalier's "past criminal charges") in providing probable cause for the warrant to issue. It is that portion of the ruling from which the petitioner is seeking relief.

B. Statement of Facts

1. The Investigation

On October 2,1999, Eric Reinholz became the target of an investigation. He was suspected of operating a methamphetamine lab.

A local pharmacy received a flyer from the Omaha Police Department. The flyer requested that the police be notified if any customer attempted to purchase iodine crystals. Iodine crystals are an ingredient used to cook methamphetamine. These crystals have a myriad of legitimate uses.

After the flyer was posted in the pharmacy, Mr. Reinholz attempted to purchase some iodine crystals. The pharmacist was asked by the police to secure as much information as possible. The pharmacist passed on Mr. Reinholz's name and the number on the license plate of his Toyota to the police.

Officer Podany, of the Omaha Police Department, was in charge of the investigation. Podany received specific training on the manufacture of methamphetamine with the Drug Enforcement Administration.

The police followed Reinholz. Podany placed the home located at 6729 N. 63rd Street under surveillance. Police contacted informants to determine, what, if any, information they possessed concerning the possible nefarious activities of Mr. Reinholz.

Informants did not know him. His residence did not have an unusual amount of foot traffic. License plates of visitors to the house were checked and then cross-checked to see if any individual was suspected or known to be using or trafficking in methamphetamine. No one observed at the house located at 6729 N. 63rd or associating with Reinholz were known to the police. Mr. Reinholz was employed. He was living within his means. He had no police record. He was not acting in a suspicious manner. Other than the order to purchase iodine crystals, no evidence was developed during a month long investigation of the petitioner.

Then, on November 18, 1999, trash was pulled from the garbage placed on the curb for collection. Several used syringes containing methamphetamine residue and a pipe used to ingest cocaine were found. Nothing was discovered from the trash that indicated that a clandestine methamphetamine lab was in operation. The syringe and pipe are consistent with personal use.

Mr. Reinholz lived with Margaret Chevalier. She had been convicted of possession of drug paraphernalia and possession of less than an ounce of marijuana in 1995. These are classified as infractions, not misdemeanors.

2. The Affidavit for the Search Warrant

On November, 20, 1999, Officer Steven Podany prepared an Affidavit and Application for a Search Warrant. Pertinent portions read as follows:

> ". . . . That the Affiant has just and reasonable grounds to believe, and does believe, that there is concealed or kept as hereinafter described, the following property, to-wit: Cocaine and methamphetamine which are controlled substances, and possession of which is illegal per Nebraska State Statutes. All monies and records used to conduct an illegal narcotics operation. Venue identifying the occupants of 6729 North 63rd Street, Omaha, Douglas County, Nebraska . . . " (This is paragraph 2 of the affidavit).
>
> ". . . . On 05 October 1998, your Affiant Officer received information from a confidential and reliable source that a party Reinholz Eric B.,

is involved in the use of methamphetamine. According to the source, Reinholz may also be involved in the distribution of methamphetamine. According to the source, REINHOLZ drives a gray 1990 Toyota Camry with Nebraska license plates: 1-EH326 . . . " (This is paragraph 5 of the affidavit).

Upon receiving this information, your Affiant Officer initiated an investigation. During this investigation, your Affiant Officer learned that Reinholz was living at the address of 6729 North 63rd Street with a female named Chevalier, Margaret.

On Wednesday, November 18, 1998, your Affiant Officer conducted a drive-by surveillance of the address of 6729 North 63rd and observed two trash cans containing several white plastic bags of trash placed near the curb in front of the residence. It should be noted that Thursday is the normal trash collection day for this residence and that it appeared that the trash cans were placed in the normal place for trash collection. At approximately 2300 hours on Wednesday, 18 November, 1998, your Affiant Officer retrieved four white plastic trash bags from the two trash cans in front of the residence.

On Thursday, 19 November, 1998, your Affiant Officer searched through the four bags of trash retrieved from 6729 North 63rd Street. In searching through the trash, your Affiant Officer recovered approximately twenty hypodermic syringes with residue, a brass pipe with residue, and venue items identifying the occupants of 6729 North 63rd Street as CHEVALIER, Margaret, and REINHOLZ, Eric.

"On Friday, 20 November, 1998, your Affiant Officer sent four of the hypodermic syringes

> and brass pipe to the Eastern Nebraska Forensic Lab for testing. The test results showed that the syringes tested positive for the presence of methamphetamine and the pipe tested positive for the presence of cocaine."
>
> "In checking Metropolitan Utilities District subscriber information for the address of 6729 North 63rd Street, records indicated the subscriber as CHEVALIER, Margaret E. In checking the Douglas County Computer system CHEVALIER was located with a listed DOB: 04/12/59. CHEVALIER has been arrested and convicted of past drug charges. REINHOLZ was located with the DOB: 03/31/68, 6'0", 200 Lbs., brown hair, brown eyes. . . . "

After reviewing the contents of the Affidavit, a magistrate signed a search warrant on November 20, 1998. The search warrant did not mention Margaret Chevalier. Reinholz's name, age and physical description were set forth with particularity in the search warrant. The warrant authorized the search for the property identified in paragraph #2 of the affidavit. Those items did not include possible seizure of property consistent with the manufacture of methamphetamine.

3. The Execution of the Search Warrant

Before the execution of the search warrant, Officer Podany and Officer Hadcock arrested Mr. Reinholz at his place of employment on November 24, 1998. The arrest occurred shortly after the work day ended. Reinholz was approached in the employee parking lot; spread-eagled against his car; patted down; handcuffed; and, placed in the back of an unmarked police cruiser.

He was driven for twenty-five minutes through rush hour traffic to a junior high school in the vicinity of his residence. Reinholz was not advised of his rights as per *Miranda v. Arizona,* 384 U.S. 436 (1966). During the drive across the city, Reinholz asked questions concerning the reason for his arrest. He was advised that he was being taken to his residence for the execution of a search warrant. It was not until several minutes after they arrived at the junior high school that Mr. Reinholz was advised of his *Miranda* rights. By that time, numerous inculpatory statements had been made by Reinholz.

Officer Podany termed the junior high school a "staging area." The execution of the search warrant required special equipment, special clothing, and other preparations specifically related to the execution of a search warrant involving a suspected clandestine methamphetamine lab.

At the time of the execution of the search warrant, Margaret Chevalier was home. She was questioned by Officer Podany without the recitation of the *Miranda* warnings. Ms. Chevalier was very upset. She began to sob. Reinholz was in the adjoining room and could hear her emotional outburst. After completing his interrogation with Ms. Chevalier, Officer Podany proceeded into the adjoining room to Re-Mirandize Reinholz. Then, Mr. Reinholz admitted his addiction to methamphetamine and that he had manufactured some for his personal use.

During the execution of the warrant, one of the officers assisting with the search noticed some drug paraphernalia inside the passenger section of a Honda

Prelude parked in the driveway. They searched the vehicle. Reinholz orally consented to a search of the Toyota Camry, still at his place of employment, during his interrogation, but refused to sign a consent form.

4. Charges

In January of 1999, a federal grand jury indicted Reinholz and Chevalier on charges of conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. §§846 and 841; maintaining a place for the purpose of manufacturing methamphetamine; attempting to manufacture methamphetamine within 1000 feet of a public elementary school in violation of 21 U.S.C. §860(a); and, unlawful possession of equipment, products, and chemicals used to manufacture methamphetamine in violation of 21 U.S.C. §843(a)(6).

5. The magistrate court's recommendation on the pretrial motions

Mr. Reinholz filed an Omnibus Motion to Suppress challenging the sufficiency of the affidavit for the search warrant pursuant to *Franks v. Delaware*. The motion also challenged the legality of Reinholz's arrest, the search of the Honda Prelude and Toyota Camry; and statements made by Reinholz obtained as a result of his illegal arrest. Chevalier filed similar motions. The magistrate judge held an evidentiary hearing on all motions. However, the magistrate judge held that Ms. Chevalier did not have standing to be afforded a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

On April 27, 1999, the evidentiary hearing was held. Officers Podany and Hadcock testified. On September 16, 1999, the magistrate judge recommended that paragraph #5 of the affidavit for the search warrant be redacted. However, he held that the sanitized affidavit constituted probable cause to issue the search warrant. His ruling hinged on the sufficiency of the evidence derived from the garbage pull. The magistrate judge recommended that the police illegally arrested Mr. Reinholz at his place of employment, resulting in the suppression of Reinholz's statements as well the search of his Toyota Camry. The magistrate recommended that the suppression of the Honda Prelude be denied.

As to Chevalier, the magistrate judge recommended that any statements made by her should be suppressed.

Chevalier and Reinholz objected to the recommendation that probable cause existed to issue the search warrant,-after the *Franks v. Delaware* redaction. The government objected to the finding that paragraph 5 of the affidavit for the search warrant be excised. The government objected to the suppression of the search of Reinholz's 1990 Toyota Camry as well as statements Reinholz made after his unlawful arrest.

6. The district court's rulings on the objections to the magistrate's recommendations

On November 19, 1999, the district court sustained the petitioner's objections as to sufficiency of probable cause to issue a warrant and rejected all of the government's objections. The district court, after distinguishing other garbage search affidavit cases from the case at bar, set forth its final conclusions, by stating:

> "The amount of evidence collected by law enforcement officials from the trash pickup at the defendant's residence does not provide a basis for probable cause. On a single occasion, police officers retrieved trash containing syringes and a pipe with cocaine residue. The Court is without knowledge of any case where a court upheld the issue of probable cause based solely on evidence garnered from a single trash pickup. To the contrary, this Court has found a case that supports a conclusion that the discovery of a minimal quantity of drug paraphernalia in a suspect's trash does not, standing alone, establish probable cause for a search warrant. See *United States v. Elliot*, 576 F. Supp. 1579 (S.D. Ohio 1984). . . . Accordingly, this Court finds that the article and amount of drug paraphernalia found in the defendant's trash are similar to those found in *Elliot*."
>
> ". . . . Consequently, this singular event cannot be categorized as evidence that would lead a reasonable police officer to believe that there was probable presence of contraband on the day of the search." (App. 36)

The order resulted in the suppression of all evidence and statements.

7. Disposition of government's appeal at the Eighth Circuit

On December 17, 1999, the government filed a Notice of Appeal. Briefs were filed. The case was submitted on May 12, 2000. On March 29, 2001, the Panel held that a one-time trash search, coupled with Ms. Chevalier's drug record provided sufficient basis in the affidavit to issue a search warrant.

> ". . . . Our conclusion that police officers did not have probable cause to arrest Reinholz does not contradict our view that the affidavit supports probable cause to search Chevalier's house. **Chevalier's drug record connected the drug paraphernalia gathered from the trash to her house and, therefore, provided the critical link supporting probable cause for the search of the house.** . . . " (App. 21. Also see App. 16) (Emphasis added).

The circuit court concluded that:

> "We hold that the district court erred when it granted Reinholz's and Chevalier's motions to suppress the evidence obtained by the Government as a result of the search of their residence and when it granted Reinholz's and Chevalier's motions to suppress the evidence obtained by the Government Podany and Hancock (sic) illegally arrested Reinholz, when it granted Reinholz's motion to suppress his post-arrest statements to police, and when it granted Reinholz's and Chevalier's motions to suppress evidence seized from the search of Reinholz's Toyota Camry."
>
> " . . . Accordingly, we reverse the district court's order granting Reinholz's and Chevalier's motions to suppress evidence from the residence and the Honda Prelude. We affirm the district court's order granting Reinholz's motion to suppress with respect to his post-arrest statements and Reinholz's and Chevalier's motions to suppress evidence gathered from the search

> of Reinholz's Toyota Camry. We remand the case to the district court for further proceedings consistent with this opinion." (App. 26-27).

On April 12, 2001, Reinholz filed a Petition for Rehearing En Banc. That same day, Chevalier filed a Petition for Rehearing by the Panel. On May 8, 2001, both petitions were denied.

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REASON FOR GRANTING THE WRIT

This Court should clarify whether Sanitized Affidavits via *Franks v. Delaware* have the same Particularity Requirements of the Fourth Amendment as Affidavits that have passed the *Leon* Test

Since *Franks v. Delaware*, 438 U.S. 154 (1978), there has been little question about the threshold necessary to merit a hearing to determine whether material misrepresentations or omissions should be excised from an affidavit for a search warrant. Once a hearing is held, there is little question about the threshold necessary to justify the excision of affidavit language.

In certain cases, however, there is a need for clarification once an affidavit has been sanitized as to what constitutes probable cause for the search warrant to issue.

The case at bar is a perfect example. Mr. Reinholz was a suspected methamphetamine manufacturer. He was a target of an investigation. The search warrant provided for the search of his person. He lived in Margaret Chevalier's home. As noted by the magistrate in his recommendation:

> ". . . . Officer Podany intended to search for a clandestine methamphetamine lab and had special protective clothing available for himself in his vehicle in the event that an active methamphetamine lab was found when the officers entered the residence. **The crime under investigation was the manufacture of methamphetamine** . . . " (App. 60) (Emphasis added).

Ms. Chevalier was not a suspect. She was not a target of an investigation. The search warrant did not provide for a search of her person. She was an afterthought.

Yet, according to the Eighth Circuit Court of Appeals, her "arrest and conviction of past drug charges" was the "critical link" in their ruling "that affidavit states sufficient facts to support a finding of probable cause." *United States v. Reinholz,* 245 F.3d 765, 776 (8th Cir. 2001).

The holding has another anomaly. The magistrate judge stated Ms. Chevalier did not have standing to participate in the *Franks v. Delaware* hearing. When her counsel tried to offer the specifics of her "past drug charges," she was not given permission to do so. (App. 120)

This ruling became critical as the case climbed its way up the appellate ladder. The magistrate judge's report and recommendation agreed that paragraph #5 should be excised, but found that that the affidavit stated sufficient grounds to issue a search warrant based on the garbage search. Co-defendant Chevalier did not appeal the standing issue because her drug record was not a factor in the magistrate judge's recommendation. (App. 59-60)

The district court overruled the magistrate judge and sustained Reinholz's and Chevalier's Motion to Suppress in its entirety. At this point, there was no reason to raise issues concerning Chevalier's standing to submit evidence concerning the allegation that she had "arrest and convictions of past drug charges" as stated in the affidavit for the search warrant.

The Eighth Circuit was the first time that Chevalier's drug record became a factor in a ruling concerning the sufficiency of the warrant. Hindsight is 20-20. Yet, if counsel for either defendant could have foreseen the significance of this fact, the true nature of Ms. Chevalier's "arrest and conviction of past drug charges" would have been before the appellate court.

The misrepresentations that have been excised in paragraph #5 of the affidavit are a harbinger of the misrepresentations concerning Chevalier's arrest and conviction of past drug charges. Pretrial Services indicated that she was never convicted of possessing drugs with the intent to distribute. She was never convicted of manufacturing drugs. She was never convicted of any drug offense that related to methamphetamine. She was not even convicted of a misdemeanor.[1] Chevalier was never arrested. Her only convictions in 1995 were deemed "infractions" for possession of less than one ounce of marijuana and possession of drug paraphernalia. In 1990, she had similar charges, but they were dismissed. An infraction is similar to a traffic citation and unless there are extenuating circumstances, there is no arrest. Because it is an infraction, it is only punishable by a fine of $100 on the first offense. There is no jail time. There is no right to counsel nor is there a right to a jury trial.

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[1] According to Pretrial services, Ms. Chevalier's record consisted of possession of drug paraphernalia and possession of less than an ounce of marijuana. The first time she was charged was in 1990. Those charges were dismissed. The second time was in 1995. According to Nebraska Revised Statute

The Eighth Circuit Opinion turned on Chevalier's arrest and conviction of past drug charges, as evidenced by the following language:

> " . . . Another trash pick-up was not necessary to confirm the presence of drugs because the affidavit stated that Chevalier occupied the house and had a drug record. **Chevalier's drug record connects the evidence gathered from the trash search to the residence**, and we believe that, on those facts, Officer Podany's affidavit states sufficient facts to support a finding of probable cause that illegal drugs were present in Reinholz and Chevalier's residence." *United States v. Reinholz,* 245 F.3d 765, 776 (8th Cir. 2001). (App. 16) (Emphasis added).

The Eight Circuit's rationale is fatally flawed. It is fraught with problems. They are:

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§28-416(13)(a), possession of less than an ounce of marijuana is an infraction. A citation is issued and the fine is $100. According to Nebraska Revised Statute §28-441, possession of drug paraphernalia is also classified as an infraction and punishable by a fine of $100.

1. Probable Cause as to the specific Offense of Manufacturing Methamphetamine

All three ruling tribunals, have agreed that paragraph #5 should be excised from the affidavit by virtue of the bad faith misrepresentations of the Affiant. The excision of paragraph #5 resulted in the affidavit being devoid of any reference of wrongdoing by Eric Reinholz.

The search warrant permitted his person to be searched. Yet, there is no indicia of probable cause allowing for such a result in the sanitized affidavit.

The affidavit was driven by an investigation of a possible clandestine meth lab. Yet, the indicia of probable cause in the sanitized affidavit is a search consistent with personal use of an individual not mentioned in the search warrant. There is no probable cause as to the existence of a clandestine methamphetamine lab in the affidavit.

In *Illinois v. Gates,* 462 U.S. 213, 231-232 (1983), this court stated that probable cause does not deal with hard certainties, but with probabilities.

> "[Probable cause] is a fluid concept turning on the assessment of probabilities in particular factual contexts not readily, or even usefully, reduced to a neat set of legal rules" and " . . . its existence must be determined by an analysis of the totality of the circumstances surrounding the intrusion.

Illinois v. Gates at 232, 238.

In *Ornelas v. United States,* 517 U.S. 690, 695-697 (1996), this court set forth a two-step process for determining the existence of probable cause. First, judges must determine "historical facts." In other words, facts leading up to the search. Second, judges are to decide, "whether these historical facts, viewed from the standpoint of a reasonable police officer amounts to probable cause."

The Eighth Circuit decision in *Reinholz* was decided in a vacuum. They did not apply the "historical facts" test as set out in *Ornelas v. United States,* supra. The history of the investigation was not considered. The search warrant was issued as though this was an investigation of Margaret Chevalier, who was suspected of possessing methamphetamine with the intent to distribute. The items sought to be seized were items consistent with personal use. The reality is that the sanitized affidavit does not fit the historical facts. This is like Cinderella trying to fit into Thumbellina's glass slipper. It is overly broad; it will not fit; and the slipper will shatter into smithereens.

2. Bad Faith

The redactions should have included other portions of the affidavit. The statement: "Chevalier has been arrested and convicted of past drug charges" (App. 78) is a reckless disregard for the truth. Ms. Chevalier was never arrested. Her drug charges were consistent with personal use and did not involve methamphetamine. There was one conviction. To represent that possession of marijuana pipe and residue in the context of the affidavit – either in the original or redacted form is the factual equivalent of stating that "the Affiant received information from a confidential and reliable source that a party named Reinholz, Eric B., is involved in the use and . . . distribution of methamphetamine." (App. 78) The pattern of deceit in paragraph #5 is repeated in the recitation of "Chevalier's arrest and conviction of past drug charges." The line should be excised.

Another "bad faith" misrepresentation extends beyond the infamous paragraph #5. The items sought to be seized did not mention items consistent with a clandestine methamphetamine lab. Officer Podany's stealth included the items sought to be searched in paragraph #2 of the affidavit.

a. Cocaine and methamphetamine;

b. Monies and records used to conduct an illegal drug operation; and,

c. Venue items identifying the occupants. (App. 80-81)

The purpose of the misrepresentations in paragraph #5 was designed to lure the issuing magistrate into believing that this was a typical drug case with a typical informant providing typical inside knowledge concerning a defendant's possession and possession with intent to distribute methamphetamine. The ruse extended to the items sought to be searched. If Officer Podany had talked of seizing manufacturing equipment, the information remaining in the affidavit would not have provided a nexus between the property sought and the residence to be searched. The magistrate would not have issued the warrant based on the information with paragraph #5 excised and the property sought to be seized during the execution of the search warrant.

In *United States v. Leon*, 468 U.S. 897, 914-15 (1984), four situations are set forth where the "good faith" exceptions do not apply. They are:

(1) If the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was

false except for a reckless regard for the truth;

(2) If the issuing magistrate wholly abandoned his judicial role;

(3) If the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or in other words, where the warrant application was supported by nothing more than a bare bones affidavit; and,

(4) If the warrant was facially deficient.

In the case at bar, three of the four exceptions apply. It is clear that under criteria (1) that the issuing magistrate was misled as to paragraph #5. However, the reckless regard for the truth extended from "Chevalier's arrest and conviction on past drug charges" to the list of items to be searched found in paragraph #2.

As the magistrate indicated in his recommendation: " . . . The crime under investigation was the manufacture of methamphetamine." (App. 60) Paragraph #5 is misleading and false. Officer Podany knew it was false. The deception to be complete had to be consistent with paragraph #5. Paragraph #2 is consistent with paragraph #5 in that regard.

There is not the slightest hint in the entire affidavit that this is a methamphetamine manufacturing investigation. The omission is misleading and false. Officer Podany knew exactly what he was doing when he presented his affidavit to the magistrate. He wanted the magistrate to believe he was investigating a methamphetamine distribution case. Paragraph #2 should be deleted from the affidavit.

Under criteria (3), if the items to be searched listed under the affidavit are excised, the result is a total lack of indicia to meet the requisite probable cause showing. There is no nexus between the underlying place to be searched and the items to be seized. In addition, there is no nexus, because the references to "Chevalier's arrest and conviction of past drug charges" should be excised. Without Chevalier's drug record, there is no "critical link."

Under criteria (4), if paragraph #2 and the allegation of past drug charges are excised, then the search warrant is facially deficient.

3. Lack of Particularity

The evidence to support probable cause must be particularized to the defendant for which the warrant is being sought. *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979).

There is a plethora of cases holding that to establish probable cause for an affidavit for a search warrant, a nexus must established between the alleged criminal activity and the defendant's residence.

The Petitioner is suggesting that some guidance from the United States Supreme Court must be given when factual scenarios mirror the one that took place in this Petition. In analyzing redacted affidavits, a reviewing court must not lose sight of the nature of the suspected wrongdoing that triggered the investigation. This concept is a bedrock principle handed down time and again by this Court.

Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) stated that the particularity requirement protects against "general, exploratory rummaging in a person's belongings."

In *Steele v. United States,* 267 U.S. 498, 503 (1925), the Court held that the warrant should describe places to be searched and objects to be searched with sufficient particularity as to leave "nothing . . . to the discretion of the officer executing the warrant."

Maryland v. Garrison, 480 U.S. 79, 84 (1987) and *Andersen v. Maryland,* 427 U.S. 463, 480 (1976) held that the particularity requirement "prevents the seizure of one thing under a warrant describing another."

A clandestine methamphetamine lab is to personal use as an oil refinery is to a filling station. At an oil refinery, property consistent with the process of converting crude oil into fuel differs greatly from property found at a filling station. At an oil refinery, there would be security guards, smoke stacks, catalytic converters, processing materials. A filling station is open to the public. Some of the property found at a filling station would be gasoline pumps, air hoses, wrenches, tires, and, windshield washing solvents.

The property seized from a methamphetamine lab would not include syringes, straws or pipes. These items are consistent with personal use. If a law enforcement officer was searching for a clandestine lab such items as filter papers, solvents, solvent containers, ephedrine, iodine crystals, funnels, tubing, and clear bottles would be the type of property that one would expect to find.

In the Petition for Writ of Certiorari filed by Margaret Chevalier, it is stated:

> " . . . the Eighth Circuit's position is a departure from the common sense assumptions that validate the probable cause standard for warrants. Because no logical connection exists between the information contained in Officer Podany's affidavit and the criminal acts under investigation, the Eighth Circuit's decision . . . violates the Fourth Amendment." (Chevalier's Petition 9-10)

The "critical link"or nexus is broken because Chevalier was not the subject of the investigation; the property under investigation did not equate to personal use sought to be seized; and the information concerning personal use was grossly misstated.

The particularity requirement of the Fourth Amendment is an essential ingredient of setting forth sufficient facts to justify the issuance of a search warrant. The history of an investigation must be **included** in the "totality of circumstances" in a redacted *Frank v. Delaware* challenge. The case at bar is a perfect example of the injustice that can occur when the same standard is applied to a sanitized affidavit. The issue is in dire need of clarification.

◆

CONCLUSION

By virtue of the Eighth Circuit's reaching to Ms. Chevalier's past drug charges, they inadvertently deprived both litigants of Due Process. Would Margaret Chevalier have been afforded standing in the spring of 1999 when the evidentiary hearing took place, if it had been anticipated that her past infraction would be the key factor in the case? Maybe it is just corn-fed naivete, but when rules are changed in mid-stream, it seems that fairness would require going back to that location in the stream where the new rule would apply and determine if the outcome would have been different.

Toward the end of the one man play, "**Clarence Darrow**" by David Rintels, Darrow is reflecting on his legal career, when he states:

> "I would feel better about my work if I felt that there had been some advance made in the law since I was admitted to the bar over 50 years ago. In science and mathematics, the world has been made over new. Even in religion, there is an entirely broader and modified attitude, but the law and its administration have stood frozen and adamant, defying all of the changes of our day and age."

The play, which was written 30 years ago, could not fathom the communications network revolution and how it would affect the administration of the law. Nevertheless, the evolution of the law moves at a snail's pace in this Court, because hindsight is 20-20. In the United States Supreme Court, it is a main ingredient in the decision-making process.

Justice was not served in this case. A police officer crossed the line not once – but several times. He battered the Fourth Amendment. He took an oath when he presented the affidavit. He violated that oath. He knowingly misled the magistrate. This conduct must be deterred. To allow a warrant to stand when the defendants were unable to fully litigate the so-called "critical link" is not consistent with Due Process. The Eighth Circuit's decision of March 29, 2001, should be reversed. At the very minimum, it should be remanded to the district court so that the breadth of Officer Podany's misdeeds are known. (The matter must be remanded, to complete the litigation of criminal proceeding.)

If in the United States Supreme Court, "hindsight is 20-20," then justice cannot be blind. Please afford Eric Reinholz some justice, grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1166

United States of America, *
Plaintiff-Appellant, *
v. *
Eric B. Reinholz; *
Margaret E. Chevalier, *
Defendants-Appellees. *

Appeal from the
United States
District Court for
the District of
Nebraska

Submitted: May 12, 2000
Filed: March 29, 2001

Before McMILLIAN, BRIGHT, and WOOD[1], Circuit Judges.

McMILLIAN, Circuit Judge.

The United States appeals the district court's order granting defendant Eric B. Reinholz's motion to suppress evidence and statements and defendant Margaret E. Chevalier's motions to suppress evidence. *United States v. Reinholz,* No. 8:99CR4 (D.Neb. Nov. 19, 1999). The Government argues that the district court erred when it granted Reinholz's and Chevalier's motions to suppress statements and evidence from the search of their residence, Honda Prelude, and Reinholz's Toyota Camry. The Government also argues that the district court erred when it granted Reinholz's motion to suppress his post-arrest statements. For the reasons discussed below, we reverse in part, affirm in part, and we remand the case for further proceedings consistent with this opinion.

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[1] The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

I. JURISDICTION

The district court acquired jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this interlocutory appeal pursuant to 18 U.S.C. § 3731. The Government's notice of appeal was timely filed pursuant to Fed. R. App. P. 4(b).

II. BACKGROUND

Iodine crystals may be used as an ingredient to manufacture methamphetamine.[2] As part of its effort to investigate methamphetamine trafficking, the Omaha Police Department asked pharmacies to report anyone buying iodine crystals. On Friday, October 2, 1998, a local pharmacist telephoned Omaha Police Officer Steven Podany and reported that Eric Reinholz ordered thirty grams of iodine crystals. The pharmacist, who wanted to remain anonymous, reported that Reinholz told the pharmacist that he wanted the crystals to clean tools, that Reinholz arranged to pick up the crystals on November 2, 1998, because they were not in stock, and that Reinholz previously purchased iodine crystals from the pharmacy. The pharmacist provided a physical description of Reinholz and the make, model, and license plate number of Reinholz's car. The pharmacist thought that Reinholz was manufacturing, distributing, and using methamphetamine because he knew of no legitimate use for iodine crystals.

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[2] Iodine crystals may also be used by farriers, farmers, and veterinarians to treat infections in horses' hooves, as an ingredient for producing germicides, fungicides, antiseptic, as a disinfectant, and in animal feeds.

On Tuesday, October 20, 1998, a pharmacist at the same pharmacy telephoned Officer Podany and reported that Reinholz planned to be at the pharmacy the next day to pay for the iodine crystals. Omaha Police Sergeant Fidone and Officer Hadcock conducted surveillance of the pharmacy and saw Reinholz enter and leave the pharmacy. They followed Reinholz to work and noted the color, make, model (gray, Toyota Camry), and license plate number of Reinholz's car. Police investigation revealed that the Toyota Camry was registered to Reinholz, but the registration address was not his residence. Officer Podany discovered Reinholz's current address and learned that Reinholz lived with Margaret Chevalier, at her house.

The police investigation continued. Sergeant Fidone returned to the pharmacy and questioned the pharmacists. The police periodically drove by Reinholz and Chevalier's residence and conducted record checks of the vehicles parked there. The police were unable to determine whether any of the individuals who visited the house were involved in drug trafficking. They determined that Chevalier had been convicted of drug charges, but they did not find any record for Reinholz. On Tuesday, November 3, 1998, Reinholz picked up the iodine crystals.

On Wednesday, November 18, 1998, Officer Podany grabbed four plastic trash bags at the curb in front of Chevalier's house. The next day, Officer Podany searched the trash bags and found twenty hypodermic syringes with residue, a brass pipe with residue, and documents identifying Reinholz and Chevalier. Officer Podany sent four syringes and the brass pipe to a state laboratory for testing. Residue on the four syringes tested positive for methamphetamine and residue on the brass pipe tested positive for cocaine.

On Friday, November 20, 1998, Officer Podany prepared an application and affidavit for a search warrant for Reinholz's person and the residence. The fifth paragraph of the affidavit provided:

> That the following are the grounds for issuance of a search warrant for said property and the reasons for the Affiant's belief, to-wit: On 05 October 1998, your Affiant Officer received information from a confidential and reliable source that a party REINHOLZ, Eric B., is involved in the use of methamphetamine.

> According to the source, REINHOLZ may also be involved in the distribution of methamphetamine. According to the source, REINHOLZ drives a gray 1990 Toyota Camry with Nebraska license plates: 1-EH326.

(Appellant's App. at A-37.) The affidavit also described Chevalier's house, the trash bags, the four syringes with methamphetamine residue, the brass pipe with cocaine residue, Chevalier's record, and Reinholz's physical description. The state judge issued a search warrant for the residence and Reinholz's person for methamphetamine and cocaine, monies and records of drug trafficking, and items identifying the occupants of the house.

On Tuesday, November 24, 1998, Officers Podany and Hadcock approached Reinholz as he was leaving work shortly after 5:00 p.m. They identified themselves, displayed their badges, and told Reinholz they had a search warrant for his person and his residence. They stood him spread-eagle, patted him down for weapons, handcuffed him, placed him in the back of Officer Podany's unmarked police car, and drove for twenty-five minutes through rush hour traffic. They did not advise Reinholz of his *Miranda* rights and they did not question him, but they did inform him that they were taking him to his residence to execute the search warrant. Reinholz asked whether the search had anything to do with the iodine crystals and whether Chevalier would be charged if anything was found in the house.

The officers stopped at a junior high school parking lot located about two blocks from Chevalier's house. Officer Podany got out of the car and Reinholz told

Officer Hadcock that they would probably find drug paraphernalia in the house but that anything found was his and not Chevalier's. When Officer Podany returned to the car, Officer Hadcock told him what Reinholz said. Officer Podany advised Reinholz of his *Miranda* rights. Reinholz waived his *Miranda* rights and agreed to talk. Reinholz was still handcuffed and sitting in the back of the unmarked police car. Reinholz said that the police would probably find drug paraphernalia in the house but that it belonged to him and not Chevalier.

Reinholz agreed to accompany the police executing the search warrant. The police entered the house and found Chevalier in the living room. After the police conducted a protective sweep, Officer Podany questioned Chevalier. The officer did not advise her of her *Miranda* rights. He asked her about Reinholz's involvement with methamphetamine and whether there was methamphetamine in the house. Chevalier became very upset and began to cry. Another police officer informed Officer Podany that they had discovered a methamphetamine laboratory in the garage, and Officer Podany stopped asking Chevalier questions.

While he was executing the search warrant, Sergeant Fidone walked past a Honda Prelude parked in the driveway. He noticed that the engine had been removed and he recognized drug paraphernalia (including a bottle of iodine crystals, a plastic bag of reddish powder, a container of lye, an Ohaus scale, and several jars containing fluids) in the front seat and back seat. Later investigation revealed that the Honda Prelude was registered to Cody Bruckner.

Officer Podany approached Reinholz, reminded him of his *Miranda* rights, told Reinholz they discovered drug paraphernalia in the garage, and asked Reinholz if he was manufacturing methamphetamine. Reinholz admitted that he was a methamphetamine addict and that he had manufactured methamphetamine two days before. Reinholz denied selling methamphetamine. Reinholz told officers that Chevalier was an occasional methamphetamine user and that he had given her methamphetamine. Reinholz also said that he manufactured methamphetamine in the garage and in the back seat of the Honda Prelude. Reinholz orally consented to a search of his Toyota Camry, but he did not sign a consent form explaining his right to refuse consent. Later, Officer Hadcock searched Reinholz's Toyota Camry and found a small black nylon bag containing drug paraphernalia.

In January 1999, a federal grand jury indicted Reinholz and Chevalier on charges of conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. §§ 846, 841, and maintaining a place for the purpose of manufacturing methamphetamine, in violation of 21 U.S.C. § 856. In addition, the grand jury charged Reinholz with manufacturing and attempting to manufacture methamphetamine within 1000 feet of a public elementary school in violation of 21 U.S.C. § 860(a), and unlawful possession of equipment, products, and chemicals which could be used to manufacture methamphetamine in violation of 21 U.S.C. § 843(a)(6).

Chevalier and Reinholz filed motions to suppress. Chevalier filed motions to suppress: (1) evidence and statements seized by the Government as a result of the search of Reinholz's Toyota Camry; (2) her statements made during the search of her residence; (3) evidence and statements seized by the Government as a result of the search of the Honda Prelude; and (4) evidence and statements obtained by the Government as a result of the search of her residence. Reinholz challenged the legality of his arrest and filed a motion to suppress the evidence and statements obtained as a result of his illegal arrest, the search of the residence, the search of the Honda Prelude, and the search of his Toyota Camry. The magistrate judge granted Reinholz's motion for a *Franks v. Delaware,* 438 U.S. 154, 155-56 (1978), hearing.

During the *Franks* hearing, Omaha Police Officers Podany and Hadcock testified and so did Reinholz. The magistrate judge recommended denying Chevalier's motions to suppress: (1) evidence and statements seized by the Government as a result of the search of Reinholz's Toyota Camry; (2) evidence and statements seized by the Government as a result of the search of the Honda Prelude; and, (3) evidence obtained by the Government as a result of the search of her residence. The magistrate judge recommended granting Chevalier's motion to suppress her statements obtained during the search of her residence. The magistrate judge recommended denying Reinholz's motion to suppress evidence seized from the residence and the Honda Prelude, but recommended granting Reinholz's motion to suppress with respect to his post-arrest statements and the evidence seized from his Toyota Camry.

Reinholz, Chevalier, and the Government objected to the magistrate judge's recommendation. After conducting a de novo review pursuant to 28 U.S.C. § 636(b)(1)(C), the district court adopted the factual findings made by the magistrate judge, modified the magistrate judge's report and recommendation, and granted all Reinholz's and Chevalier's motions to suppress evidence and statements. The Government appealed pursuant to 18 U.S.C. § 3731. The Government does not appeal that part of the district court order granting Chevalier's motion to suppress her statements.

III. DISCUSSION

A. SEARCH WARRANT

We review the trial court's findings of fact for clear error and we give deference to the inferences drawn from those facts by law enforcement officers, the court that issued the search warrants, and the trial court. *Ornelas v. United States,* 517 U.S. 690, 691 (1996); *see also United States v. Ball,* 90 F.3d 260, 262 (8th Cir. 1996), *cert. denied,* 522 U.S. 1152, *and reh'g denied,* 523 U.S. 1134 (1998). We review de novo whether the facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. *Id.*

The district court determined that Officer Podany misled the issuing judge in his affidavit by using the terms "confidential and reliable" in a manner that implied that his source had personal knowledge of Reinholz's methamphetamine use and distribution. In fact, Officer Podany's source was a local pharmacist who knew only that Reinholz purchased iodine crystals. The district court deleted the fifth paragraph and found that the remainder of the affidavit was insufficient to support a finding of probable cause.

The Government argues that the district court applied the wrong analysis when it evaluated the affidavit and erred when it determined that Officer Podany recklessly misled the issuing judge by misrepresenting the nature of his source. The Government argues that the affidavit's fifth paragraph did not misrepresent but, rather, omitted information that his source was the pharmacist who personally observed Reinholz purchase iodine crystals. The Government claims that the district court should not have deleted the fifth paragraph but should have considered whether the affidavit supported a finding of probable cause when supplemented by the omitted information. In the alternative, the Government argues that, even without the fifth paragraph and without supplementing the omitted information, the affidavit supports a finding of probable cause.[3]

Reinholz and Chevalier argue that the district court applied the correct analysis when it determined that Officer Podany recklessly used the term "confidential and reliable" source to mislead the issuing judge about the nature of his source and properly deleted the falsehoods contained in the fifth paragraph. Reinholz also argues that Officer Podany recklessly omitted information. Reinholz claims that Officer Podany omitted that the police surveillance of his residence and investigation of its visitors failed to connect Reinholz to drug use or distribution and that Reinholz did not have a criminal record. Reinholz and Chevalier both conclude that the district court did not err in finding the affidavit did not support a finding of probable cause.

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[3] The Fourth Amendment protects a defendant's sufficient and reasonable expectation of privacy in the place to be searched. *Minnesota v. Carter,* 525 U.S. 83, 87 (1998). The record is unclear as to whether Reinholz had a sufficient and reasonable enough expectation of privacy in Chevalier's residence to trigger Fourth Amendment protection. The Government, however, failed to raise this issue on appeal and, therefore, it is waived.

A search warrant may be invalid if the issuing judge's probable cause determination was based on an affidavit containing false or omitted statements made knowingly and intentionally or with reckless disregard for the truth. *Franks v. Delaware,* 438 U.S. at 171. To prevail on a *Franks* claim the defendants must show: (1) that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit; and (2) that the affidavit's remaining content is insufficient to establish probable cause. The same analysis applies to omissions of fact. The defendant must show: (1) that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading; and (2) that the affidavit, if-supplemented by the omitted information, could not support a finding of probable cause. *United States v. Gladney,* 48 F.3d 309, 313 (8th Cir. 1995); *see also United States v. Humphreys,* 982 F.2d 254, 258 n.2, 259 (8th Cir. 1992) (citing *United States v. Lueth,* 807 F.2d 719, 726 (8th Cir. 1986)), *cert. denied,* 510 U.S. 814 (1993); *United States v. Reivich,* 793 F.2d 957, 960 (8th Cir. 1986).

The district court did not err in its analysis of Officer Podany's affidavit. The district court properly analyzed Officer Podany's affidavit as *Franks* requires. First, the court analyzed whether Officer Podany's affidavit contained a false statement or omission made knowingly and intentionally, or with reckless disregard for the truth. It concluded that it contained false statements. Second, it turned to the question of whether the affidavit's remaining content was sufficient to establish probable cause.

The district court did not err when it determined that Officer Podany recklessly misled the issuing judge by misrepresenting the nature of his source. Officer Podany's claim to have received information from a "confidential and reliable" source recklessly misrepresented the nature of his source by implying that his informer had personal knowledge of Reinholz's methamphetamine use and distribution. Officer Podany knew that the sole basis for the pharmacist's opinion concerning Reinholz's methamphetamine use was Reinholz's purchase of iodine crystals. Officer Podany's "confidential" characterization was misleading because the pharmacist dropped his request for anonymity by the time Officer Podany filed his affidavit. Officer Podany's reliability claim was misleading because it implied that his source had knowledge of Reinholz's drug activities and that independent police investigation corroborated the informant's declarations. In fact, police investigation merely corroborated the pharmacist's description of Reinholz's automobile and license plate. Contrary to Officer Podany's statement, the pharmacist was not a confidential source and his reliability was not related to any personal knowledge of or corroborated information concerning Reinholz's methamphetamine use. Therefore, the district court did not err when it determined that Officer Podany recklessly misled the issuing judge by misrepresenting the nature of his source.

The Government claims that the district court should not have deleted the fifth paragraph but, rather, should have considered whether the affidavit supported a finding of probable cause when supplemented by the omitted information. Reinholz and Chevalier argue that the district court properly deleted the fifth paragraph because the fifth paragraph of Officer Podany's affidavit contained misrepresentations.

The district court properly deleted the misrepresentations contained in the fifth paragraph of the affidavit. Officer Podany's affidavit included false statements made with reckless disregard for the truth. We remedy a *Franks* misrepresentation by deleting the false statements. The entire fifth paragraph of Officer Podany's affidavit contains false information and the district court was correct to delete it. Thus, the district court did not err when it deleted the fifth paragraph of Officer Podany's affidavit.

We recognize that the exclusionary rule does not apply to negligent misrepresentations or omissions. *United States v. Schmitz,* 181 F.3d 981, 986 (8th Cir. 1999) (citing *Kelly v. Curtis,* 21 F.3d 1544, 1554 (11th Cir. 1994)). In any case, retroactively supplementing the affidavit with material omissions bolstering probable cause would undermine the deterrent purpose of the exclusionary rule. *Stone v. Powell,* 428 U.S. 465, 486-89 (1976) (holding deterrence of Fourth Amendment violations by law enforcement personnel is the prime purpose of the exclusionary rule); *see also United States v. Fletcher,* 91 F.3d 48, 52 (8th Cir. 1996) (same), *cert. denied,* 520 U.S. 1121 (1997); *Williams v. Nix,* 700 F.2d 1164, 1174 (8th Cir. 1983) (same), *rev'd on other grounds,* 467 U.S. 431 (1984). Therefore, the district court did not err when it refused to supplement the affidavit with more precise information concerning the nature of Officer Podany's source.

Next, we consider whether the remaining content of the affidavit supports a finding of probable cause to search Reinholz and Chevalier's residence.[4] Officer Podany's affidavit, without the fifth paragraph, sets out Reinholz's name, address, a personal description of him and his car, the drug paraphernalia gathered from the trash search, and Chevalier's drug record. The affidavit does not include any information concerning Reinholz's iodine crystal purchase. The magistrate judge concluded that the affidavit, without the fifth paragraph, established probable cause. The district court disagreed, and concluded that the affidavit, without the fifth paragraph, did not establish probable cause.

The Government cites a number of cases in support of its argument that affidavits based almost entirely on evidence gathered from trash may establish probable cause. *United States v. Hohn*, 8 F.3d 1301 (8th Cir. 1993); *see also United States v. Gregg*, 829 F.2d 1430 (8th Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988); *United States v. Biondich*, 652 F.2d 743 (8th Cir.), *cert. denied*, 454 U.S. 975 (1981); *United States v. Sumpter*, 669 F.2d 1215 (8th Cir. 1982). Reinholz and Chevalier argue that the affidavit does not support a finding of probable cause without the fifth paragraph and they attempt to distinguish the Government's cases by showing that, in each case cited by the Government, probable cause was supported by more than mere trash evidence.

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[4] The Government appeals the district court order granting Reinholz's and Chevalier's motions to suppress the evidence gathered from the residence. The Government does not appeal the district court's order with respect to the search warrant for Reinholz's person and, therefore, it is waived. Accordingly, we consider solely the search warrant with respect to the residence and not with respect to Reinholz's person.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and it requires probable cause for lawful searches and seizures. U.S. Const. amend. IV; *see also Illinois v. Gates,* 462 U.S. 213, 230, 235 (1983). To determine whether probable cause exists to support a search warrant we look at the "totality of the circumstances." *Id.* A warrant is supported by probable cause if "there is a fair probability that contraband or evidence of a crime will be found in the place to be searched." *United States v. Mahler,* 141 F.3d 811, 813 (8th Cir.) (quoting *Gates,* 462 U.S. at 238 (internal quotations omitted)), *cert. denied,* 525 U.S. 885 (1998). We assess probable cause from the viewpoint of a reasonably prudent police officer, *United States v. Peep,* 490 F.2d 903, 906 (8th Cir. 1974), acting in the circumstances of the particular case, *United States v. Regan,* 525 F.2d 1151, 1155 (8th Cir. 1975). We remain mindful that probable cause is a practical, factual, and nontechnical concept, dealing with probabilities. *Gates,* 462 U.S. at 230.

We believe that Officer Podany's affidavit states sufficient facts to support a finding of probable cause that illegal drugs were present in Reinholz and Chevalier's residence at the time the warrant was issued. This is a fact-intensive Fourth Amendment inquiry resting on probabilities and, therefore, we believe that none of the cases cited by the parties controls. *See United States v.*

Button, 653 F.2d 319, 327 (8th Cir. 1981) ("Because of the kaleidoscopic myriad that goes into the probable cause mix seldom does a decision in one case handily dispose of the next.") (quoting *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972) (internal quotations omitted)). Without the fifth paragraph, the evidence gathered from the trash provided a substantial supporting basis for the search warrant. Officer Podany collected four white plastic trash bags found inside two trash cans, placed at the curb in front of Reinholz and Chevalier's residence, the day before the normal day for trash collection. Officer Podany's search of the four trash bags revealed twenty syringes with methamphetamine residue, a brass pipe with cocaine residue, and documents identifying Reinholz and Chevalier as the occupants of the house. The information was not stale: the trash was deposited for collection and seized on Wednesday; Officer Podany's search on Thursday uncovered the syringes, brass pipe, and documents connecting Reinholz and Chevalier to the trash; that Friday, laboratory tests confirmed methamphetamine in four of the syringes and cocaine in the brass pipe and Officer Podany filed the application for the search warrant; and, the search warrant was executed the following Tuesday. The syringes with methamphetamine residue and the brass pipe with cocaine residue point to a significant amount of drug activity and suggest that evidence of continued drug activity would probably be found in the house. Another trash pick-up was not necessary to confirm the presence of drugs because the affidavit stated that Chevalier occupied the house and had a drug record. Chevalier's drug record connects the evidence gathered from the trash search to the residence and we believe that, on those facts, Officer Podany's affidavit states sufficient facts to support a finding of probable cause that illegal drugs were present in Reinholz and Chevalier's residence at the time the warrant was issued. Therefore, we hold that the district court erred when it granted Reinholz's and Chevalier's motions to suppress the evidence obtained by the Government as a result of the search of the residence.

B. HONDA PRELUDE SEARCH

The Government argues that the evidence gathered from the search of the Honda Prelude should not have been suppressed as "fruit of the poisonous tree" because Officer Podany's affidavit supported probable cause to search Reinholz and Chevalier's residence and the Honda Prelude was within the curtilage of the residence and in plain view.[5] Reinholz and Chevalier argue that the evidence gathered from the search of the Honda Prelude was properly suppressed because the search warrant for the residence was invalid and the Honda Prelude search was "fruit of the poisonous tree."

The search of the Honda Prelude did not violate the Fourth Amendment because it was in the plain view of the police officers executing a valid search warrant for the house. *Texas v. Brown*, 460 U.S. 730, 738, 739 n.4 (1983) (determining "plain view" provides grounds for seizure of an item when an officer's access to the object has some prior justification under the Fourth Amendment). The "plain view" doctrine permits police to seize an item not specified in a search warrant if the police are lawfully in a position to observe the item and its incriminating character is immediately apparent. *Horton v. California,* 496 U.S. 128, 136-38 (1990). When the police executed the valid search warrant on Reinholz and Chevalier's residence the Honda Prelude was sitting in the driveway and drug paraphernalia was immediately apparent through the car's windows. Thus, the search of the Honda Prelude did not violate the Fourth Amendment and, therefore, the district court erred when it granted Reinholz's and Chevalier's motions to suppress the evidence obtained by the Government as a result of the search of the Honda Prelude.

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[5] The record is unclear as to whether Reinholz and Chevalier had a sufficient and reasonable expectation of privacy in the Honda Prelude registered to Cody Bruckner to trigger Fourth Amendment protection. The Government, however, failed to raise this issue on appeal and, therefore, it is waived.

C. REINHOLZ'S ARREST

The district court determined that Reinholz was illegally arrested at work and granted his motion to suppress his post-arrest statements because they were the fruit of his illegal arrest. The Government maintains that Reinholz's warrantless arrest was proper on the basis of probable cause. We reject the Government's argument.

It stands undisputed that Reinholz's seizure rose to the level of a full-scale arrest. Officers Podany and Hancock [sic] met Reinholz at his workplace shortly after 5:00 p.m. As Reinholz approached his vehicle, the plain clothes officers identified themselves, made him stand spread-eagle against his Toyota Camry, patted him down for weapons, handcuffed him, and placed him in the back seat of their unmarked police car. He was not free to leave. *United States v. Tovar-Valdivia,* 193 F.3d 1025, 1027-28 (8th Cir. 1999) (determining that defendant was under arrest when police officer handcuffed him).

The Government argues that Reinholz's arrest may be justified because it was carried out in connection with a lawful search warrant. We disagree. Reinholz's arrest cannot be justified under *Michigan v. Summers,* 452 U.S. 692 (1981), in which the Supreme Court held that police officers, executing a valid warrant to search a house, properly detained a resident of the house as he was walking down the front steps. In *Summers,* the intrusiveness of detaining an occupant of the premises being searched was outweighed by the law enforcement interests in: (1) preventing flight; (2) minimizing the risk of harm to the officers; and (3) conducting an orderly search. *Id.* at 701-03; *see also United States v. Hogan,* 25 F.3d 690, 693 (8th Cir. 1994). *Summers* does not apply to this case, however, because Reinholz was not on the premises being searched when he was detained. In fact, he was nowhere near his residence. Rather, he was at work, at least a twenty-five-minute drive from his residence. Reinholz was not a flight risk and his seizure did not minimize any possible risk he posed to the officers because Reinholz was at work and he was unaware of the warrant. Therefore, Reinholz's arrest cannot be justified under *Summers* as a legitimate detention of an occupant of the premises to be searched.

The Government analogizes to *United States v. Sherrill,* 27 F.3d 344 (8th Cir.), *cert. denied,* 513 U.S. 1048 (1994), in support of its argument that Reinholz's arrest was legal because the officers had probable cause to arrest him. *Sherrill,* however, does not apply to this case. In *Sherrill,* police officers executing a valid search warrant saw Sherrill leave his residence in his car, they stopped him one block away, and detained him. The court examined the totality of the circumstances and held that probable cause existed because independent police investigation corroborated information from a reliable and confidential informant that Sherrill was dealing crack from his house and surveillance detected an unusual amount of pedestrian traffic consistent with drug dealing. In this case, however, no informant notified police, there existed no corroborating independent police investigation, and surveillance failed to reveal any criminal activity.

Probable cause for an arrest exists when the totality of circumstances demonstrates that the arresting officer personally knows or has been reliably informed of sufficient facts to warrant a belief that a crime has been committed and that the person to be arrested committed it. *Kuehl v. Burtis,* 173 F.3d 646, 650 (8th Cir. 1999) (citing *United States v. Washington,* 109 F.3d 459, 465 (8th Cir. 1997)).

We have carefully reviewed the record and we conclude that the police officers did not have probable cause to arrest Reinholz because the arresting officers did not personally know or have reliable information to warrant a belief that Reinholz committed a crime. Reinholz did not have a drug record, police did not observe him engaged in any illegal activity, there was no corroborating independent police investigation, and surveillance failed to reveal any criminal activity connected to the visitors of Chevalier's house. Police had been reliably informed that Reinholz legally purchased iodine crystals and their trash search revealed drug paraphernalia. That information does not provide sufficient facts to warrant a belief that Reinholz committed a drug offense. Our conclusion that police officers did not have probable cause to arrest Reinholz does not contradict our view that the affidavit supports probable cause to search Chevalier's house. Chevalier's drug record connected the drug paraphernalia gathered from the trash to her house and, therefore, provided the critical link supporting probable cause for the search of her house. The police officers did not, however, have probable cause to arrest Reinholz because the information in their possession at the time of the arrest did not sufficiently warrant a belief that Reinholz committed a crime. Therefore, we hold that the district court did not err when it determined that Officers Podany and Hancock [sic] illegally arrested Reinholz.

D. REINHOLZ'S STATEMENTS

Reinholz argues that his statements to police following his illegal arrest should be suppressed. The Government argues that Reinholz's statements before he was advised of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966), should not be suppressed because they were voluntary and his statements after he was advised of his *Miranda* rights should not be suppressed because the *Miranda* warnings rid the taint of his illegal arrest. The district court granted Reinholz's motion to suppress his statements (made before and after the *Miranda* warnings) because it determined that Reinholz was illegally arrested and there had been no causal break between Reinholz's unlawful arrest and his statements to police officers.

The exclusionary rule prohibits the admission of physical and testimonial evidence gathered illegally. *Wong Sun v. United States,* 371 U.S. 471, 484-88 (1963). There are, however, three exceptions to the exclusionary rule. *United States v. Dickson,* 64 F.3d 409, 410 (8th Cir. 1995), *cert. denied,* 516 U.S. 1064 (1996); *see also Hamilton v. Nix,* 809 F.2d 463, 465-66 (8th Cir.) (en banc), *cert. denied,* 483 U.S. 1023 (1987). Under the "independent source doctrine," the challenged evidence is admissible if it came from a lawful source independent of the illegal conduct. *Id.* Under the "attenuated connection doctrine," the challenged evidence is admissible if the causal connection between the constitutional violation and the discovery of the evidence is so attenuated as to rid the taint. *Id.* Under the "inevitable discovery doctrine," the challenged evidence is admissible if it inevitably would have been discovered by lawful means without reference to the police misconduct. *Id.* In addition, for the statements given to police after an unlawful arrest to be admissible, the statement must not only be voluntary under Fifth Amendment standards but must not be the result of an unconstitutional seizure. *Brown v. Illinois,* 422 U.S. 590, 602 (1975). We evaluate four factors to determine whether statements made to the police after an illegal arrest are admissible: (1) whether the suspect has been advised of his *Miranda* rights prior to giving his statement; (2) the temporal proximity of his statements to his illegal seizure; (3) the existence of intervening causes between the illegal arrest and the statements; and (4) the purpose or flagrancy of the official misconduct. *Id.* at 603-604.

Officers Podany and Hadcock illegally arrested Reinholz in his employer's parking lot. They did not have an arrest warrant. They made him stand spread-eagle, patted him down for weapons, handcuffed him, and placed him in the back of Officer Podany's unmarked police car. They did not advise Reinholz of his *Miranda* rights and they did not question him, but they told him they were taking him to his residence to execute a search warrant. For twenty-five minutes the officers drove through rush-hour traffic to a junior high school parking lot located about two blocks from Chevalier's house. Reinholz asked the officers why he was being arrested, and he made several statements during the drive and in the parking lot. Officer Podany ultimately advised Reinholz of his *Miranda* rights after they reached the junior high school parking lot. Reinholz was still handcuffed and sitting in the back of the unmarked police car.

We have carefully reviewed the record and we believe that Reinholz's first set of statements are inadmissible because they followed directly from his illegal arrest and no intervening event purged the taint of his illegal arrest. We also believe that his post-*Miranda* statements are inadmissible because the *Miranda* warnings did not purge the taint of his illegal arrest. Therefore, we hold that the district court did not err when it granted Reinholz's motion to suppress his post-arrest statements to police.

E. TOYOTA CAMRY SEARCH

Reinholz and Chevalier argue that the evidence seized from the search of his Toyota Camry should be suppressed because Reinholz's consent was tainted by his illegal arrest. The Government argues that the evidence seized from Reinholz's Toyota Camry should not be suppressed because his consent to the search was voluntary. The district court granted Reinholz's and Chevalier's motions to suppress because it determined that Reinholz's consent to search his Toyota Camry was tainted by his illegal arrest.

To claim Fourth Amendment protection, a defendant must show a reasonable and sufficient expectation of privacy in the place to be searched. *Minnesota v. Carter,* 525 U.S. at 87 (rejecting standing doctrine rubric in Fourth Amendment context). As a general rule, however, an appellate court may review only the issues specifically raised and argued in an appellant's brief. *United States v. Simmons,* 964 F.2d 763, 777 (8th Cir.) (citation omitted), *cert. denied,* 506 U.S. 1011 (1992); *see also Borough v. Duluth, Missabe & Iron Range Ry. Co.,* 762 F.2d 66, 68 (8th Cir. 1985) (determining that issue not raised on appeal is abandoned).

The Government does not argue that Chevalier cannot claim Fourth Amendment protection for Reinholz's Toyota Camry because she lacks a sufficient and reasonable expectation of privacy in his Toyota Camry. The Government has waived that claim because it failed to raise the issue on appeal. Therefore, we will consider both Reinholz's and Chevalier's motions to suppress the evidence gathered from Reinholz's Toyota Camry.

The police may conduct a search without a warrant and without probable cause if the suspect voluntarily consents to the search. *United States v. Matlock,* 415 U.S. 164, 171 (1974); *see also Schneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973). The burden is on the Government to show by a preponderance of the evidence that, under the totality of the circumstances, the defendant voluntarily consented. *Id.; see also United States v. Severe,* 29 F.3d 444, 446 (8th Cir. 1994), *cert. denied,* 513 U.S. 1096 (1995). We consider the following characteristics of the individual to determine whether their consent was truly voluntary: age, intelligence, intoxication, advice of *Miranda* rights, and previous arrests. *United States v. Chaidez,* 906 F.2d 377, 381 (8th Cir. 1990) (listing factors). We also consider the following characteristics of the environment in which the individual's consent was given to determine whether their consent was truly voluntary: length of detention, threats and misrepresentations by police, whether the individual is in custody or under arrest, whether it is a public or private place, and the suspect's contemporaneous objections and representations. *Id.* We review the district court's determination that Reinholz's consent was not sufficiently an act of free will to purge the taint of his illegal arrest for clear error. *United States v. Hathcock,* 103 F.3d 715, 720 (8th Cir.) (reviewing for clear error), *cert. denied,* 521 U.S. 1127 (1997); *see also Chaidez,* 906 F.2d at 380-81.

We believe that the district court did not clearly err when it determined that Reinholz's consent to search his Toyota Camry was not voluntary. Reinholz's consent to search his Toyota Camry was not voluntary because it followed from his illegal arrest and no intervening events purged the taint of his illegal arrest. The district court found that Reinholz was illegally arrested in his employer's parking lot, he stood spread-eagled, patted down, handcuffed, and placed in an unmarked police car. Police officers drove him twenty-five minutes through rush-hour traffic to a junior high school parking lot two blocks from his residence. Reinholz was upset, he questioned the purpose of his detainment, he expressed concern for his partner, Margaret Chevalier, and he made several statements. The officers were not forthcoming and they did not advise Reinholz of his *Miranda* rights until after they reached the junior high school parking lot. Reinholz had no previous arrests. When the officers initially asked Reinholz if they could search his Toyota Camry, he orally consented. Reinholz refused to sign a consent form, however, that explained his right to deny permission to search the car. We have examined the totality of the circumstances surrounding Reinholz's consent and we believe that the district court did not clearly err when it determined that Reinholz's consent followed from his illegal arrest and that it should be excluded because no intervening event purged the taint of the illegal arrest. Therefore, we hold that the district court did not err when it granted Reinholz's and Chevalier's motions to suppress evidence seized from the search of his Toyota Camry.

IV. CONCLUSION

We hold that the district court erred when it granted Reinholz's and Chevalier's motions to suppress the evidence obtained by the Government as a result of the search of their residence and when it granted Reinholz's and Chevalier's motions to suppress the evidence obtained by the Government as a result of the search of the Honda Prelude. We hold that the district court did not err when it determined that Officers Podany and Hancock [sic] illegally arrested Reinholz, when it granted Reinholz's motion to suppress his post-arrest statements to police, and when it granted Reinholz's and Chevalier's motions to suppress evidence seized from the search of Reinholz's Toyota Camry.

Accordingly, we reverse the district court's order granting Reinholz's and Chevalier's motions to suppress evidence from the residence and the Honda Prelude. We affirm the district court's order granting Reinholz's motion to suppress with respect to his post-arrest statements and Reinholz's and Chevalier's motions to suppress evidence gathered from the search of Reinholz's Toyota Camry. We remand the case to the district court for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. ERIC B. REINHOLZ, and MARGARET E. CHEVALIER, Defendant.	)	CASE NO. 8:99CR4 **MEMORANDUM AND ORDER** (Filed Nov. 19, 1999)

I. INTRODUCTION

The matters before the Court are 1) defendant Reinholz's motion to suppress and request for evidentiary hearing (Filing 33); 2) defendant Chevalier's motion to suppress evidence (1990 Toyota Camry) and request for evidentary hearing (Filings 25); 3) defendant Chevalier's motion to suppress statements and request for evidentiary hearing (Filing 26); 4) defendant Chevalier's motion to suppress evidence (1985 Honda Prelude) and request for evidentiary hearing (Filing 27); 5) defendant Chevalier's motion to suppress evidence (residence) and request for evidentary hearing (Filing 28); 6) defendant Chevalier's motion to suppress evidence (*Franks v. Delaware*) and request for evidentiary hearing (Filing 45); 7) the magistrate judge's report and recommendation (Filing 70) denying in part and granting in part the defendants' motion to suppress; 8) the government's appeal of the magistrate judge's report and recommendation (Filing

74); 9) defendant Chevalier's response to plaintiff's objections to the magistrate judge's report and recommendation (Filing 75); 10) defendant Chevalier's statement of objections to the magistrate's report and recommendation (Filing 76); and 11) defendant Reinholz's statement of objection to the magistrate's report and recommendation (Filing 78).

The indictment charges that the defendants 1) conspired to manufacture methamphetamine in violation of 21 U.S.C. § 846; 2) manufactured methamphetamine within a thousand feet of a public elementary school in violation of 21 U.S.C. § 860(a); 3) possessed equipment, products, and chemicals used to manufacture methamphetamine in violation of 21 U.S.C. § 843(a)(6); and 4) maintained a place for the purpose of manufacturing methamphetamine in violation of 21 U.S.C. § 856.

Having reviewed the record, including the defendants' motions (Filings 25, 26, 27, 28, 33 and 45), the parties' briefs, the transcript (TR) (Filing 52) of the hearing on the motions, the report and recommendation of the magistrate judge (Filing 70), the government's appeal from the report and recommendation (Filing 74), and the defendants' objections to the report and recommendation (Filings 76 and 78), the Court will modify the magistrate judge's report and recommendation and grant all of the defendants' motions to suppress.

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objections are made. The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The Court may also receive further evidence or remand the matter to the magistrate judge with instructions.

III. STATEMENT OF FACTS

Having reviewed the defendants' objections, the Court finds that the defendant does not object to any of the factual findings contained in the magistrate judge's report and recommendation (Filing 70). Accordingly, because the defendant does not dispute the validity of any specific finding as recorded in the report and recommendation, the Court shall adopt the factual findings of the magistrate judge in their entirety.

IV. DISCUSSION

A. SEARCH WARRANT

On November 20, 1998, law enforcement officials conducted a search of the defendants' residence at 6729 North 63rd Street in Omaha, Nebraska, pursuant to a search warrant issued by Judge Stephen M. Swartz of Douglas County, Nebraska. The defendants assert that the affidavit in support of this search warrant did not contain sufficient facts to constitute probable cause for the issuance of the warrant. Moreover, the defendants argue that reckless omissions and misrepresentations of material fact make the search warrant invalid. The defendants contend that no reasonable law enforcement official could have relied in good faith on the issuance of the search warrant based upon the affidavit in support of the search warrant.

The government asserts that the application and affidavit for the search warrant contained sufficient probable cause to search the defendants' residence. Although the government admits that the officer charged with drafting the affidavit omitted information regarding a confidential informant and defendant Reinholz's lack of a criminal record, the government contends that these omissions were neither material nor reckless and that they did not mislead the issuing judge. Furthermore, the government asserts that even if the paragraph regarding the confidential informant were to be excised, the affidavit would still establish sufficient probable cause based on evidence recovered through the collection of the defendants' garbage by law enforcement officials.

A presumption of validity exists with respect to the affidavit supporting a search warrant. *Franks v. Delaware,* 438 U.S. 154, 171 (1978). The application and affidavits which support a request for a search warrant should be examined under a common sense approach and not in a hypertechnical sense. *United States v. Williams,* 10 F.3d 590, 593 (8th Cir. 1993). However, the factual information providing probable cause for issuance of a search warrant must also be truthful in the sense that the information is believed or appropriately accepted as true by the person submitting the information. *Franks,* 438 U.S. at 165. A warrant which is based upon an affidavit containing deliberate falsehood or reckless disregard for the truth violates the Fourth Amendment. *Id.*

The Court agrees with the magistrate judge's conclusion that Officer Podany misled the issuing county judge when he omitted information concerning a confidential informant from the application and affidavit for search warrant for defendant Reinholz's person and residence. The officer used the terms "confidential" and "reliable" in a manner that implied the informant had personal knowledge of defendant Reinholz's use of methamphetamine or his involvement in the distribution of methamphetamine. In fact, the informant was a pharmacist who had knowledge only of defendant Reinholz's purchase of iodine crystals from his pharmacy. Officer Podany was reckless in his disregard of the truth in not fully informing the issuing judge of the nature and extent of the information received from the "confidential and reliable" source. Accordingly, the paragraph concerning this information (i.e., paragraph five) should be excised. However, the question remains as to whether the remainder of the affidavit and application sets forth sufficient probable cause for the issuance of a search warrant for the person of Reinholz and his residence.

Probable cause is determined under the totality of the circumstances test. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). In the issuance of a search warrant, the Fourth Amendment dictates that an impartial, neutral, and detached judicial officer will assess the underlying factual circumstances so as to ascertain whether probable cause exists to conduct a search or to seize incriminating evidence, the instrumentalities or fruits of a crime, or contraband. *United States v. Johnson,* 64 F.3d 1120, 1126 (8th Cir. 1995). Probable cause is a fluid concept, turning on the assessment of probabilities in particular factual contexts, not readily, or even usefully, reduced to a neat set of legal rules. *Gates*, 462 U.S. at 232. In order to find probable cause, it must be demonstrated that, in light of all the circumstances set forth in the supporting affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular, designated place. *United States v. Gladney*, 48 F.3d 309, 312 (8th Cir. 1995).

The Court finds that probable cause does not exist after the excision of paragraph five from the affidavit and application for search warrant for the person of Reinholz and his residence. In his report and recommendation, the magistrate judge determined that even with paragraph five excised, the only substantial basis for the issuance of the warrant for defendant Reinholz's residence would be the information obtained from the trash pick-up, wherein Omaha Police officers found syringes with methamphetamine residue and a brass pipe with cocaine residue. Supported by the holdings in three cases, *see United States v. Sumpter*, 669 F.2d 1215, 1221 (8th Cir. 1982); *United States v. Reicherter*, 647 F.2d 397, 398 (3rd Cir. 1981); *Magda v. Benson*, 536 F.2d 111, 112 (6th Cir. 1976), the magistrate judge concluded that affidavits for search warrants based entirely upon evidence garnered from garbage may be sufficient for the issuance of a search warrant for the premises. However, the Court finds that all three of those cases are distinguishable from the facts of the present case.

In *Sumpter*, a Minneapolis Police Department officer filed an affidavit and application for search warrant for a residence suspected of harboring illegal drug activities. The officer supported his request with information he had collected from two confidential reliable informants over the course of a year. Both informants independently advised the officer that the defendant was selling cocaine out of his residence. Moreover, the officer also had information from several of the defendant's neighbors concerning the large amount of short term traffic entering and leaving the residence, the defendant's prior arrest at the same residence for heroin trafficking, and a trash pickup that contained traces of marijuana. Therefore, it is indisputable that the officers established sufficient evidence to demonstrate probable cause for a search warrant. The officers had two reliable confidential informants, several neighborhood witnesses who could corroborate the amount of short term traffic, the defendant's prior arrest record, and a trash pickup that showed traces of illegal narcotics. In the present case, the police officer had evidence from one trash pickup, no reliable confidential informants, no witnesses to any illegal drug activity, and the defendant did not have a prior criminal record.

In *Reicherter*, officers of the Philadelphia Police Department collected the defendant's trash on three separate occasions. The trash was found to contain methamphetamine on each occasion, and this fact formed the basis for a probable cause affidavit for a search warrant of the defendant's home. Furthermore, at the subsequent trial, it was revealed that prior to the trash pickup the police officers conducted several controlled buys of methamphetamine from a co-defendant at the defendant's residence through a Drug Enforcement Agency informer. This informer, along with another confidential informant, had also individually purchased methamphetamine from the defendant, and in fact directly observed the defendant manufacturing methamphetamine, several months prior to the controlled buys. Therefore, it is apparent that the police officers in *Reicherter* established a stronger pattern of evidence than the officers did in the present case. Through three separate trash pickups consistently showing evidence of methamphetamine and the information garnered from reliable informants, the police were able to concretely show probable cause for a search warrant. In the present case, the officers obtained evidence from a single trash pickup several days before the execution of the search warrant. Moreover, they did not establish any other existing sources of information regarding the defendant's alleged illegal drug activities.

In *Magda,* law enforcement officials suspected the defendant as the individual who burglarized a post office and stole government property. Postal inspectors placed the defendant under surveillance, and later retrieved a garbage bag from the defendant's treelawn next to the street adjacent to his residence. The postal inspector found evidence that tended to incriminate the defendant in the burglary, and based on this discovery, a search warrant was issued by a magistrate judge. The issue in this case, however, was whether the garbage search invaded his reasonable expectation of privacy and whether evidence so obtained can be used for the basis of a valid search warrant under the Fourth Amendment. The court never stated the items discovered by postal inspectors in the garbage. Therefore, the Court finds that although this case addresses the broader issue of the validity of trash pickups in the issuance of search warrants, it does not have any actual factual applicability in justifying the existence of probable cause in the present case.

The amount of evidence collected by law enforcement officials from the trash pickup at the defendants' residence does not provide a basis for probable case. On a single occasion, police officers retrieved trash containing syringes and a pipe with cocaine residue. This Court is without knowledge of any case where a court upheld the issue of probable cause based solely on evidence garnered from a single trash pickup. To the contrary, this Court has found a case that supports a conclusion that the discovery of a minimal quantity of drug paraphernalia in a suspect's trash does not, standing alone, establish probable cause for a search warrant. *See United States v. Elliot*, 576 F. Supp. 1579 (S.D. Ohio 1984). In *Elliot*, the court concluded that the discovery of discarded contraband (i.e., a quantity of partially smoked marijuana cigarettes and several stems from marijuana stalks) was insufficient to support the determination of probable cause. *Id.* at 1581. The Court stated that the waste products of marijuana use do not, of themselves, indicate any continuing presence of contraband in the home. *Id.* Accordingly, this Court finds that the articles and amount of drug paraphernalia found in the defendants' trash are similar to those found in *Elliot*. The warrant in the instant case was executed approximately one week after the contraband was found, there was no evidence of continued drug activity in the house, and there was no evidence that the contraband in the trash container actually came from the suspect house as opposed to some passerby or neighbor. Consequently, this singular event cannot be categorized as evidence that would lead a reasonable police officer to believe that there was probable presence of contraband on the day of the search.

Furthermore, the search warrant for defendant Reinholz's person is invalid because law enforcement officials did not have any additional evidence other than described above that would constitute a sufficient probable cause to believe that on or about the defendant's person there would be found controlled substances. Accordingly, the Court finds that the affidavit and application for search warrant for the defendant's residence at 6729 North 63rd Street and his person lacked probable cause. Therefore, the Court will grant the defendants' motion to suppress for the residence and defendant Reinholz's person.

B. SEARCH OF THE HONDA PRELUDE AND TOYOTA CAMRY

The defendants assert that the Court should suppress all evidence and statements obtained by law enforcement officers as a result of the search of the Honda Prelude registered to Cody Bruckner of 6707 S. 139th Ave. Cir. located in the driveway of the defendants' residence. The defendants contend that neither the affidavit and application for the search warrant nor the search warrant itself included any reference to any vehicles. Furthermore, the defendants argue that the officers violated their Fourth Amendment rights by conducting the search of the Honda Prelude without probable cause and without consent of the person authorized to consent to the search.

The defendants also assert that evidence and statements obtained by law enforcement officials as a result of the search of the Toyota Camry registered to defendant Reinholz and located at his place of employment should be suppressed. The defendants contend that officers violated the defendant's Fourth and Fifth Amendment rights, most specifically his expectation of privacy right, because defendant Reinholz did not voluntarily consent to a search of his vehicle. Moreover, the defendants argue that the Toyota Camry was not described in the affidavit and application for search warrant, and that there was no probable cause to execute the search warrant on the vehicle. Furthermore, the defendants argue that this search was tainted by the unlawful arrest of defendant Reinholz at his place of employment, and that as a fruit of that poisonous tree, any evidence obtained from the vehicle should be suppressed.

The government asserts that the officers' search of the Honda Prelude was proper because it was within the curtilage of the residence, and therefore within the reach of the search warrant issued for the residence. Moreover, the government argues that the plain-view doctrine validates the officers' search of the vehicle since an officer looking through untinted windows recognized items contained within the vehicle as materials used in the manufacture of methamphetamine. Therefore, under the plain-view doctrine, the plaintiff contends that the defendants had no expectation of privacy in the vehicle, and that law enforcement officials were authorized to search the vehicle.

The government also argues that the evidence relating to defendant Reinholz's statement to officers establishes that he voluntarily consented to the search of the Toyota Camry. The government contends that law enforcement officials advised defendant Reinholz of his *Miranda* rights prior to this voluntary consent on two occasions. Moreover, the government asserts that by applying the test of personal and environmental factors found in *United States v. Chaidez*, 906 F.2d 377, 380 (8th Cir. 1990), it is clear that defendant Reinholz clearly and completely understood the situation and his rights and protections. Therefore, the government contends that defendant Reinholz voluntarily consented to the search of his Toyota Camry.

The issue concerning the Honda Prelude is whether drugs and/or other drug paraphernalia not observed during the initial entry and first discovered by law enforcement officials the day of the entry in a vehicle located in the residence's driveway should be suppressed. Under the Supreme Court's holdings, the suppression or exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search and seizure but also evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree. *Segura v. United States*, 468 U.S. 796, 804 (1984) (*citing Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338, 341 (1939)). This doctrine extends as well to the indirect as the direct products of unconstitutional conduct. *Id.* (*citing Wong Sun v. United States*, 371 U.S. 471, 484 (1963)). Therefore, evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. *Id.*

This Court has already determined the invalidity of the initial search warrant for the defendants' residence. The Court finds that even though the Honda Prelude was within the curtilage of the residence, the evidence contained within the vehicle is the fruit of an illegal search of the residence. Law enforcement officers were in a position to observe the paraphernalia contained inside the Honda Prelude that was within plain-view only because of their illegal search of the defendants' residence. Similarly, even if defendant Reinholz did consent to the search of the Toyota Camry located at his place of employment, his consent was made as a result of an unlawful search warrant and seizure of his person. Therefore, the exclusionary rule requires the suppression of any consent given by defendant Reinholz because it was obtained through illegal government conduct that was not "purged of its primary taint." *Wong Sun* 371 U.S. at 484-488. Defendant Reinholz's consent and the subsequent search of the Toyota Camry by law enforcement officers are fruits of the poisonous tree. *Nardone,* 308 U.S. at 341. Accordingly, the Court will grant the defendants' motions to suppress the evidence found in the Honda Prelude and Toyota Camry.

C. STATEMENTS BY REINHOLZ

Defendant Reinholz contends that statements he made while officers transported him to his residence and before he was advised of his *Miranda* rights should be suppressed because they were not voluntary and were a result of his illegal arrest. The defendant argues that officers advised him of his *Miranda* rights only after he had made certain involuntary and incriminating statements against his interests, and that these statements were induced by the officers' promises. Therefore, the defendant asserts that his statements made to law enforcement officials, before and after he was advised of his *Miranda* rights, must be suppressed because they not only violate his Fourth and Fifth Amendment rights, but also are fruits of both illegal arrest and the illegal search of his residence.

The government argues that the defendant's statements made before and after the officers advised him of his *Miranda* rights were voluntary and should not be suppressed. The government observes that officers testified that they did not initiate any questioning, and that if they did make promises of leniency, those promises were not sufficient to overbear the free will of the defendant. Moreover, the government asserts that the defendant's waiver of his *Miranda* rights was voluntary and the product of a free and deliberate choice, and that therefore his statements made after this waiver were voluntary and admissible. Furthermore, the government contends that the defendant's initial detention at his place of work was reasonable and lawful, and did not violate his Fourth Amendment rights.

The Court agrees with the magistrate judge's conclusion that defendant Reinholz was unlawfully seized at his place of employment. Not only did the officers lack the authority to execute the arrest, but as this Court has already determined, the affidavit and application for the search of Reinholz's person had no probable cause basis. The exclusionary rule requires the suppression of evidence obtained through illegal government conduct unless the evidence has been "purged of its primary taint." *Wong Sun,* 371 U.S. at 484-488. In order for a statement given to police after an unlawful seizure to be admissible at trial, the statement must not only be voluntary by Fifth Amendment standards, but it must also not be the result of exploiting the illegal seizure; rather, it must be an "act of free will sufficient to purge the primary taint." *Id.* at 486; *Brown v. Illinois*, 422 U.S. 590, 602 (1975). This Court finds that the causal chain between defendant Reinholz's unlawful seizure and his subsequent statements to law enforcement officers before and after officers advised him of his *Miranda* rights was unbroken. Therefore, any statements the officers obtained from defendant Reinholz are indisputably tainted fruits of the illegal arrest and should be suppressed. Accordingly, the Court will grant the defendant's motion to suppress any statements made by defendant Reinholz in connection with his illegal detainment.

D. STATEMENTS BY CHEVALIER

Defendant Chevalier asserts that any statements law enforcement officials obtained from her in conjunction with the search of the residence should be suppressed. The defendant contends that at least one law enforcement officer violated her Fifth and Sixth Amendment rights by questioning her without any oral or written advice of her *Miranda* rights. Furthermore, the defendant argues that these statements were both involuntary and fruits of an illegal search of the residence.

The government asserts that the defendant was not initially advised of her *Miranda* rights because officers did not consider her to be a suspect, and that even though she was not free to leave the residence, she was not in custody at the start of the interview. Moreover, the government contends that the officer conducting the interview asked questions concerning only defendant Reinholz's possible involvement in illegal activities, and that once the officer learned of a possible connection between defendant Chevalier and potential incriminating evidence contained within the residence, he terminated the interview. Moreover, the government asserts that the defendant's statements were voluntary. Therefore, the government argues that *Miranda* warnings were not necessary because the questions asked of the defendant were not intended to implicate her in the illegal activity, but were instead focused on providing additional evidence against defendant Reinholz.

Custody occurs either upon formal arrest or under any other circumstances where the suspect is deprived of his freedom of action in any significant way. *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984). In determining whether a suspect is "in custody" at a particular time the court examines the extent of the physical or psychological restraints placed on the suspect during interrogation in light of whether a "reasonable person in the suspect's position would have understood his situation" to be one of custody. *United States v. Carter*, 884 F.2d 368, 370 (8th Cir. 1989). If the defendant believed her freedom of action had been curtailed to a "degree associated with formal arrest," and that belief was reasonable from an objective viewpoint, the defendant was being held in custody during the interrogation. *Berkemer*, 468 U.S. at 440. The examination of custody arises from an examination of the totality of the circumstances. *Carter*, 884 F.2d at 370 (*citing United States v. Lanier*, 838 F.2d 281, 285 (8th Cir. 1988).

The Court finds that defendant Chevalier was in custody at the time of her questioning by law enforcement. During the interview conducted by Officer Podany, defendant Chevalier was not placed in handcuffs, but neither was she free to leave the residence. Moreover, the manner used during the questioning of defendant Chevalier by Officer Podany and the types of questions directed toward her demonstrate that she was considered a suspect, or at the very least a person with knowledge of the alleged illegal drug activities. Based on the totality of the circumstances, the Court finds that a reasonable person could infer that law enforcement officers curtailed defendant Chevalier's freedom of action. Defendant Chevalier was also not properly informed of her *Miranda* rights by the officer conducting the interview, and these actions violated her constitutional rights under the Fifth and Sixth Amendments. Furthermore, the officer's questioning of defendant Chevalier was in conjunction with the execution of an invalid search warrant, and as fruit of that invalid search warrant, it should be duly suppressed. Accordingly, the Court will grant defendant Chevalier's motion to suppress statements.

IT IS THEREFORE ORDERED that

1. The plaintiff's appeal (Filing 74) of the magistrate judge's report and recommendation (Filing 70) is overruled;

2. The defendants' objections (Filings 76 and 78) to the magistrate judge's report and recommendation (Filing 70) and the defendant Chevalier's response (Filing 75) to the plaintiff's objections (Filing 74) to the magistrate

judge's report and recommendation (Filing 70) are sustained;

3. Defendant Reinholz's motion to suppress (Filing 33) is granted;

4. Defendant Chevalier's motion to suppress evidence (1990 Toyota Camry) (Filing 25) is granted;

5. Defendant Chevalier's motion to suppress statements (Filing 26) is granted;

6. Defendant Chevalier's motion to suppress evidence (1985 Honda Prelude) (Filing 27) is granted;

7. Defendant Chevalier's motion to suppress evidence (residence) (Filing 28) is granted;

8. Defendant Chevalier's motion to suppress evidence (*Franks v. Delaware*) (Filing 45) is granted;

9. The magistrate judge's report and recommendation dated September 16, 1999 (Filing 70), is adopted as to the portions granting the motions to suppress (Filings 26 and 33) and is otherwise overruled as to the portions denying the motions to suppress (Filings 25, 27, 28 and 45).

DATED this 19 day of November, 1999.

BY THE COURT:

/s/ Joseph F. Bataillon
JOSEPH F. BATAILLON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	**8:99CR4**
Plaintiff,	)	**REPORT AND**
vs.	)	**RECOMMENDATION**
ERIC B. REINHOLZ, and MARGARET E. CHEVALIER,	)	**(FILED SEP 16 1999)**
Defendants.	)	

This matter is before the court on the following motions of the defendants Eric B. Reinholz (Reinholz) and Margaret E. Chevalier (Chevalier):

- ➤ Filing No. 25 – Chevalier's motion to suppress (1990 Toyota Camry);
- ➤ Filing No. 26 – Chevalier's motion to suppress statements;
- ➤ Filing No. 27 – Chevalier's motion to suppress (1985 Honda Prelude);
- ➤ Filing No. 28 – Chevalier's motion to suppress (residence);
- ➤ Filing No. 45 – Chevalier's motion to suppress (residence); and
- ➤ Filing No. 33 – Reinholz's motion to suppress.

Reinholz and Chevalier are charged in an indictment with a conspiracy to manufacture methamphetamine (Count I – 21 U.S.C. § 846), the manufacture of methamphetamine within a thousand feet of a public elementary school

(Count II – 21 U.S.C. § 860(a)), the possession of equipment, products and chemicals used to manufacture methamphetamine (Count III – 21 U.S.C. § 843(a)(6)), and the maintenance of a place for the purpose of manufacturing methamphetamine (Count IV – 21 U.S.C. § 856). The defendants seek to suppress various items of evidence seized and statements made on November 24, 1998, following the execution of a state court authorized search warrant at their residence, 6729 North 63rd Street, Omaha, Nebraska.

The court held an evidentiary hearing on April 27, 1999. Since the court had granted defendant Reinholz's motion for a *Franks* hearing, evidence beyond the four corners of the Affidavit and Application was received. **See** Filing No. 42. During the evidentiary hearing, the court heard the testimony of Officers Steven Eugene Podany (Officer Podany) and Gregory Hadcock (Officer Hadcock) of the Omaha Police Department (OPD), and testimony of the defendant Reinholz. The court received into evidence an affidavit and application for a search warrant (Exhibit 1 and 104), an advice of rights form (Exhibit 2), and a permission to search form (Exhibit 3). Also received into evidence were copies of OPD reports concerning this case, Exhibits 101, 102, and 107. A transcript (TR.) of the hearing was filed on May 21, 1998 (Filing No. 52). Posthearing briefing was completed on July 1, 1999.

FINDINGS OF FACT

On October 2, 1998, Officer Podany was assigned to the Narcotics Unit of OPD (TR. 5). On October 2, 1998, Officer Podany received information from a local pharmacist that a subject, later identified as Reinholz, had just ordered a thirty (30) gram container of iodine crystals from Kohll's Pharmacy and Home Care (the Pharmacy), 4230 L Street in Omaha, Nebraska (Exhibit 102). The pharmacist stated the iodine crystals were scheduled to be picked up at a later date (Exhibit 101). Based on Officer Podany's experience and training, Officer Podany was aware iodine crystals are an ingredient, or precursor, for making methamphetamine (TR. 15). As part of the ongoing effort to investigate methamphetamine trafficking, law enforcement agencies contact pharmacies and alert the pharmacies to the illegal use of iodine crystals and request the pharmacies contact law enforcement whenever there are attempts to purchase iodine crystals (TR. 15). On October 20, 1998; Officer Podany received another call from the Pharmacy informing Officer Podany that the subject (Reinholz) would be coming to the Pharmacy on October 21, 1998, to prepay for the iodine crystals ordered (Exhibit 102). OPD Sergeant Fidone and Officer Hadcock conducted surveillance of the Pharmacy on October 21, 1998 (Exhibit 102). Reinholz was observed entering and leaving the Pharmacy and was followed to his place of employment at Logan Contractors Supply, Inc., at 7887 F Street in Omaha (Exhibit 102). Reinholz was driving a gray Toyota Camry bearing Nebraska license plate number 1-EH326 (Exhibit 102).[1] Sergeant

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[1] Throughout the OPD reports and the Affidavit and application for the search warrant, the vehicle was consistently described as a gray Toyota Camry bearing Nebraska license plate 1-EH 326; however, the year of the vehicle was misidentified as a 1985, 1990, or 1995 model. The court does not

Fidone returned to the Pharmacy and spoke to several of the pharmacists who said Reinholz had already prepaid for the order and had picked up the iodine crystals that day (Exhibit 102) The price of the thirty grams of iodine crystals was thirty dollars with a fifty dollar shipping cost (Exhibit 102). When Reinholz first ordered the iodine crystals, Reinholz told the pharmacist he was going to use the iodine crystals to clean tools (Exhibit 102). When Reinholz picked up the iodine crystals, Reinholz told the pharmacist he was going to use the iodine crystals for a special paint design on a vehicle (Exhibit 102). Around 3:00 p.m., surveilling OPD officers observed Reinholz leaving his employment at 7887 F Street. Reinholz was followed, with several intermittent stops, to 8205 Manderson Circle in Omaha, which residence was believed to belong to Reinholz's parents (Exhibit 102). While Page 1 of Sergeant Fidone's OPD report dated October 22, 1998, reflects a registration of the vehicle to Eric Reinholz at 4915 Burt Street, Omaha, Nebraska, Page 5 of the same report reflects: "At this time officers are able to determine that the vehicle is registered to, REINHOLZ, ERIC, but to an unknown location." (Exhibit 102).

Following the incidents of October 21, 1998, Officer Podany conducted additional investigation regarding Reinholz. Officer Podany determined Reinholz lived at 6729 North 63rd Street, Omaha, Nebraska, with defendant Chevalier (TR. 21). Officer Podany and other OPD

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find the variances in the description of the model year of the vehicle to be material since the remainder of the description of the vehicle, i.e., "a gray Toyota Camry bearing Nebraska license plate 1-EH326" is sufficiently specific.

officers conducted drive-by surveillance of Reinholz and the residence at 6729 North 63rd Street (TR. 21-22). When Officer Podany observed vehicles at the 6729 North 63rd Street residence, he would note the license plates and do record checks of the registered owners (TR. 22). Through the drive-by surveillance, Officer Podany was unable [sic] ascertain that any of the individuals who visited the premises or owned the vehicles parked at the residence were involved in the distribution of drugs (TR. 22-23). On November 3, 1998, Reinholz picked up some iodine crystals and was driving a gray Toyota Camry bearing Nebraska license plate number 1-EH326 (Exhibit 101). On the evening of November 18, 1998, Officer Podany retrieved four bags of trash which had been left in two trash cans at the curb for trash collection in front of 6729 North 63rd Street (Exhibit 1). On November 19, 1998, Officer Podany searched the trash bags and found twenty hypodermic needles with residue, a brass pipe with residue, and venue items identifying the occupants of 6729 North 63rd Street as Reinholz and Chevalier (Exhibit 1). On November 20, 1998, Officer Podany sent four of the hypodermic needles and the brass pipe to the Eastern Nebraska Forensic Lab for testing (Exhibit 1). Test results indicated the presence of methamphetamine on the syringes and cocaine on the brass pipe (Exhibit 1).

On November 20, 1998, Officer Podany prepared an application and affidavit for a search warrant for the search of Reinholz's person and the premises at 6729 North 63rd Street (Exhibit 1). Following a standard recitation of facts to support venue, Officer Podany placed the following paragraph (the "Fifth Paragraph") in his affidavit:

> That the following are the grounds for the issuance of a search warrant for said property and the reason for the Affiant's belief, to-wit: On 05 October 1998, your Affiant Officer received information from a confidential and reliable source that a party, REINHOLZ, Eric B., is involved in the use of methamphetamine. According to the source, REINHOLZ may also be involved in the distribution of methamphetamine. According to the source, REINHOLZ drives a gray 1990 Toyota Camry with Nebraska license plates: 1-EH326.

(Exhibit 1). The affidavit continued with statements about Reinholz living at 6729 North 63rd Street with Chevalier and of the trash pull from the residence on November 18, 1998 (Exhibit 1). The affidavit concluded with a recitation of a utilities check for the residence and a statement that a computer check on Chevalier and Reinholz revealed Chevalier "had been arrested and convicted of drug charges," and set forth Reinholz's date of birth and physical description (Exhibit 1).

Officer Podany erred in including October 5, 1998, as the date of receipt of information from the confidential source since the information was received on October 2, 1998 (TR. 13-14). The confidential source set forth in the affidavit was, in fact, a pharmacist at the Pharmacy (TR. 11-12; 34; 40-41). When Officer Podany first spoke to him, the pharmacist did not want his identity revealed (TR. 34). Officer Podany considered the pharmacist reliable because the license plate number given to Officer Podany checked out to Reinholz and the physical description matched Reinholz (TR. 34). As Officer Podany testified: "And that's what we made – that's how we made him reliable, the information he gave was [sic] able to substantiate through other means." (TR. 34). The information that the pharmacist gave to Officer Podany about Reinholz being a user of methamphetamine was simply the opinion of the pharmacist as the pharmacist was aware of no legitimate use of iodine crystals except for the manufacture of methamphetamine (TR. 41). Officer Podany was unaware of the basis for the pharmacist's opinion, and Officer Podany was unaware the pharmacist had any other information of Reinholz's drug activities other than Reinholz's purchase of the iodine crystals (TR. 41-42).

A search warrant authorizing the search of Reinholz's person and the premises at 6729 North 63rd Street was signed by Douglas County Court Judge Stephen M. Swartz on November 20, 1998 (TR. 73-74); Exhibit 1). The OPD officers decided to execute the search warrant for Reinholz's person after Reinholz got off work, shortly after 5:00 p.m. on November 24, 1998, in the area of 78th and F Streets in Omaha (TR. 74). Officers Podany and Hadcock approached Reinholz when Reinholz left the building, identified themselves as Omaha Police officers, displayed their badges, and advised Reinholz they had a search warrant for Reinholz's person and his residence (TR. 75). Reinholz was patted down for weapons, handcuffed, and placed in the back seat of Officer Podany's unmarked police car (TR. 75). Reinholz was not advised of his ***Miranda*** rights, was not questioned, and was told he was going to be transported to his residence to execute the search warrant (TR. 76). From the location of 78th and F Streets, Officers Podany and Hadcock transported Reinholz via the Interstate to the parking lot of Nathan Hale Junior High School which was approximately two blocks from Reinholz's residence (TR. 76). The parking lot was selected as the staging area by the OPD for execution of the search warrant of the residence (TR. 77).

The trip to the staging area took approximately twenty-five minutes (TR. 77). During the car trip to the staging area, Officer Podany testified Reinholz was not asked any questions but Reinholz did ask the officers "what this was about?" (TR. 78). When Reinholz was told the officers had a search warrant for his residence, Reinholz asked whether "this has to do with the iodine crystals [he] was purchasing?" (TR. 78). Officer Podany told Reinholz they would talk with him after executing the search warrant (TR. 78). After the officers arrived at the staging area in the school parking lot, Officer Podany got out of the vehicle leaving Reinholz and Officer Hadcock in the vehicle (TR. 81). Reinholz asked Officer Hancock [sic] if his girlfriend, Margaret Chevalier, would be charged if anything was found in the residence (TR. 79). Reinholz was told they would talk about that after the search of the residence (TR. 80). Reinholz told Officer Hadcock that when the officers searched the residence they would probably just find some items of paraphernalia, but anything found in the residence was his and not Chevalier's (TR. 80-81).

When Officer Podany returned to the vehicle, Officer Hadcock told Officer Podany what Reinholz had stated (TR. 82). Officer Podany then advised Reinholz of Reinholz's ***Miranda*** rights by using an OPD advice of rights form (TR. 82; Exhibit 2). After reading the form to Reinholz and after Reinholz agreed to talk with Officer Podany, Officer Podany conducted a short interview of Reinholz while Reinholz was still seated and handcuffed in the back of the vehicle (TR. 84). Reinholz did not appear to be under the influence of alcohol or drugs, and Reinholz appeared to understand the questions asked by Officer Podany (TR. 83-84). Officer Podany asked Reinholz if the officers would find anything when they searched the residence, and Reinholz reiterated what he told Officer Hadcock earlier (TR. 84-85). Reinholz was asked who would be in the residence (TR. 85). When Reinholz told the officers that Chevalier would be in the residence, possibly with her son, Reinholz was asked if he would accompany the officers to the door so Chevalier would not be startled (TR. 85).

The searching officers proceeded from the staging area to the residence and knocked on the door (TR. 86). The officers entered the residence at 5:45 p.m. and found Chevalier in the living room of the residence (TR. 86). After a sweep of the residence to check for other persons and finding none, the officers began their search (TR. 86). Around 6:00 p.m., Officer Podany spoke to Chevalier in the kitchen area (TR. 86-87). Officer Podany testified he did not advise Chevalier of her ***Miranda*** rights as he did not consider her a suspect and was not going to ask anything about her involvement in the matter (TR. 87). Officer Podany testified neither Chevalier nor Reinholz was free to leave the residence and he did not tell Chevalier that she was free to leave (TR. 121). Officer Podany asked Chevalier about Reinholz's involvement with methamphetamine and whether there was any methamphetamine in the house (TR. 87). Chevalier became very upset, started to cry, began to visibly shake, and looked away from Officer Podany (TR. 87). Officer Podany repeated his question to Chevalier with the same response by Chevalier (TR. 88). When one of the searching officers approached Officer Podany and informed him that the officers had found some equipment in the garage, Officer Podany asked Chevalier if Reinholz was involved in the manufacture of methamphetamine (TR. 88). After the items were found in the garage, Officer Podany testified he considered Chevalier a suspect and stopped asking her questions (TR. 88-89).

As the officers approached the residence to execute the search warrant, they observed a gray 1985 Honda Prelude parked in the driveway so that one had to walk past the Honda Prelude to go into the residence (TR. 90-91). Later, the officers discovered the Honda Prelude was not operable as the engine had been removed (TR. 91). As sergeant Fidone, one of the officers of the search team, walked past the Honda Prelude, he observed a box full of items in the front seat and other items in the back seat which he believed might be used to manufacture methamphetamine (TR. 92-93). These items included an Oldhaus triple beam scale and several jars with fluids in them (TR. 93). The items were similar to those seized in the garage and were later seized from the Honda Prelude (TR. 93-94).

Around 6:30 p.m., Officer Podany again spoke with Reinholz (TR. 95). After reminding Reinholz of the advice of rights previously given to Reinholz, Officer Podany told Reinholz what was found in the garage and asked if Reinholz was manufacturing methamphetamine in the residence (TR. 96). Reinholz admitted he had manufactured methamphetamine, he last cooked methamphetamine two days before the search warrant, and he was an addict to methamphetamine (TR. 96). Reinholz denied selling methamphetamine but did state Chevalier was an occasional user of methamphetamine and had received methamphetamine from him (TR. 96). Reinholz told Officer Podany he had cooked methamphetamine in the garage and also had used the back seat of his car to "cold cook" methamphetamine (TR. 97). When asked if the officers could search Reinholz's car which was left parked at Reinholz's place of employment, Reinholz gave verbal permission to search the car (TR. 97-98; Exhibit 3). Reinholz asked the car not be impounded as Reinholz need [sic] it for work (TR. 100). Officer Podany told Reinholz the car would not be impounded if nothing was found in the vehicle (TR. 100). Reinholz declined to sign the written permission to search form for the car, and Officer Podany made notations on the form accordingly (TR. 97). Officer Hadcock obtained the keys from Reinholz and returned to the parking lot of the business near 78th and F Streets where Officer Hadcock searched the Toyota Camry (TR. 154-55). Officer Hadcock seized a small black nylon bag that contained some drug paraphernalia from the back seat of the car (TR. 155).

LEGAL ANALYSIS

A. Search Warrant

The court finds Officer Podany misled County Court Judge Swartz with omissions in the affidavit and application for the search warrant for the search of the person of Reinholz and the search of the premises at 6729 North 63rd Street. Paragraph Five of the affidavit omits information with a reckless disregard for the truth. Paragraph Five asserts Officer Podany received information from a confidential and reliable source that Reinholz used methamphetamine and that Reinholz may be involved in the distribution of methamphetamine. In fact, the source was a pharmacist (or a composite of several pharmacists at Kohll's Pharmacy) where Reinholz ordered and obtained iodine crystals. The use of the term "confidential", while accurate at the time of Officer Podany's receiving the information, was not accurate at the time Officer Podany signed the affidavit. Further the term "reliable" was used by Officer Podany only because the pharmacist's description of the person and the car chrecked out to be Reinholz [sic] and the car Reinholz drove. The pharmacist knew nothing of Reinholz or his activities except that Reinholz ordered and obtained iodine crystals. The sole basis of the pharmacists's opinion that Reinholz was a methamphetamine user or that he may be involved in distribution of methamphetamine was Reinholz's acquisition of iodine crystals. Such information was never placed in the affidavit by Officer Podany. The clear import and Officer Podany's statements in the Fifth Paragraph of the affidavit was that Officer Podany had a source who had person knowledge of Reinholz's use of methamphetamine and Reinholz's possible distribution of methamphetamine. Such was not the case and Officer Podany knew that. Officer Podany was reckless in his disregard of the truth in not disclosing the true nature of the information received from the "confidential and reliable" source. ***United States v. Reivich,*** 793 F.2d 957, 960 (8th Cir. 1986). As such the Fifth Paragraph of the affidavit will be excised in accordance with ***Franks v. Delaware,*** 438 U.S. 154 (1978).

Reinholz also claims the affidavit was misleading since Officer Podany did not affirmatively include the fact that Reinholz had no past criminal or drug record. The court disagrees with Reinholz's assertion regarding the failure of Officer Podany to affirmatively include in the affidavit a statement that Reinholz had no criminal record. The Affidavit and Application did contain information that Chevalier had "been arrested and convicted of past drug charges," but was silent as to Reinholz. There is no falsity or omission with regard to Reinholz. A reasonable person reading the affidavit would conclude that while Chevalier had a criminal record, Reinholz had none. Such a conclusion would have been accurate as Reinholz had no criminal record.

With the excision of the Fifth Paragraph, the question remains as to whether or not the remainder of the Affidavit and Application sets forth sufficient probable cause for the issuance of a search warrant for the person of Reinholz and the premises of 6729 North 63rd Street on November 20, 1998. ***United States v. Lucht,*** 18 F.3d 541, 546 (8th Cir.), **cert. denied**, 513 U.S. 949 (1994). An affidavit for a search warrant must contain probable cause of four ingredients: time, crime, objects, and place. 2 Wayne R. LaFave, ***Search and Seizure,*** § 3.7(d) at 372 (3d ed. 1996). As the Supreme Court stated in ***Illinois v. Gates,*** 462 U.S. 213 (1983):

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair

> probability that contraband or evidence of a crime will be found in a particular place.

Id. at 238. With the Fifth Paragraph excised, the only substantial basis for the issuance of the warrant for the premises at 6729 North 63rd Street would be the information obtained from the trash pick [sic] wherein OPD officers found syringes with methamphetamine residue and a brass pipe with cocaine residue. Affidavits for search warrants based entirely upon evidence garnered from garbage may be sufficient for the issuance of a search warrant for the premises. **See *United States v. Sumpter*,** 669 F.2d 1215, 1221 (8th Cir. 1982); ***United States v. Reicherter*,** 647 F.2d 397, 398 (3rd Cir. 1981); ***Magda v. Benson*,** 536 F.2d 111, 112 (6th Cir. 1976). The information garnered from the trash was not stale since the trash pickup was only two days before the application for the warrant. Further the quantity of syringes discovered was substantial. The court finds on the basis of the trash pickup alone, there was sufficient probable cause for Judge Swartz to reasonably believe that evidence of a controlled substance violation, e.g., possession and use of methamphetamine and cocaine, would be found at the premises at 6729 North 63rd Street.

However, the finding of probable cause as to the premises does not *ipso facto*, equate as probable cause for the issuance of a search warrant for the person of Reinholz. The affidavit, as excised, provides that Reinholz resided at 6729 North 63rd Street and that numerous syringes with methamphetamine residue and a brass pipe with cocaine residue were found in the trash of 6729 North 63rd Street. The question is whether such information states sufficient probable cause for the issuance of a search warrant for Reinholz's person. The court finds the statements constitute sufficient probable cause to believe that on or about Reinholz's person would be found controlled substances. This is especially true due to the number of administering instruments, i.e., the syringes, which were found in the trash of the premises. Accordingly, the search warrant for Reinholz's person was valid. However, there is no evidence that any items were seized from Reinholz's person as a result of the search warrant.

The search warrant only authorized the seizure of: (1) cocaine and methamphetamine; (2) monies and records used to conduct an illegal narcotics operation; and (3) venue items identifying the occupants of 6729 North 63rd Street. The bulk of the items actually seized as described in the search warrant return could be classified as manufacturing paraphernalia. It should be remembered that, in his application for the search warrant, Officer Podany only sought to seize: 1) cocaine and methamphetamine, (2) monies and records used to conduct an illegal narcotics operation; and (3) venue items identifying the occupants of 6729 North 63rd Street. In fact, Officer Podany intended to search for a clandestine methamphetamine lab and had special protective clothing available for himself in his vehicle in the event an active methamphetamine lab was found when the officers entered the residence (TR. 142; 145). The crime under investigation was the manufacture of methamphetamine. When searching officers observe items that are of an incriminating nature even though the item is not described in the search warrant, the items may be seized. ***Horton v. California,*** 496 U.S. 128 (1990); ***Coolidge v. New Hampshire,*** 403 U.S. 443 (1971). The court finds the items seized as described in the search warrant return to be proper under all the circumstances.

Accordingly, the motion to suppress the evidence set forth in the list of items retained as evidence described in Exhibit 107 as being seized from the premises at 6729 North 63rd Street should be denied.

B. Search of the Honda Prelude

Both Reinholz and Chevalier move to suppress the evidence seized from the Honda Prelude, which was parked in the driveway of 6729 North 63rd Street during the execution of the search warrant on November 24, 1998. The Honda Prelude had its motor missing and was a [sic] not a movable object. The Honda Prelude was a few feet from the front door of the residence. Officers had to walk past the Honda Prelude to get into the residence. As the officers walked past, they could see, through the clear car windows, items in the front and back seats of the Honda Prelude. Since the Honda Prelude was within the curtilage of the residence, officers could search the Honda Prelude pursuant to the search warrant that had been issued for the residence. **See** ***United States v. Dunn,*** 480 U.S. 294 (1987).

Further, Sergeant Fidone recognized the materials in the Honda Prelude as being materials capable of being used in the manufacture of methamphetamine by simply observing them through the car window. Sergeant Fidone had a right to be in the position to observe the materials by virtue of the search warrant. Accordingly, the seizure of the items in the Honda Prelude was also lawful under the "plain view" doctrine and no search was involved in the seizure of the items. **See** ***United States v. Hughes,*** 940 F.2d 1125, 1126-27 (8th Cir.); **cert. denied,** 502 U.S. 896 (1991); ***Texas v. Brown,*** 460 U.S. 730, 740 (1983).

The motions of Chevalier and Reinholz to suppress the seizure of items from the Honda Prelude should be denied.

C. Search of the Toyota Camry

Both Chevalier and Reinholz seek to suppress the items seized from Reinholz's Toyota Camry which was parked at Reinholz's place of employment. To claim Fourth Amendment protection, a defendant must demonstrate that he or she personally has an expectation of privacy in the place searched, and that his or her expectation is reasonable. ***Minnesota v. Carter,*** 119 S. Ct. 469, 472 (1998); ***Rawlings v. Kentucky,*** 448 U.S. 98, 104-05 (1980); ***United States v. Lyton,*** 161 F.3d 1168, 1170 (8th Cir. 1998); ***United States v. Kiser,*** 948 F.2d 418, 423-24 (8th Cir. 1991), **cert. denied,** 503 U.S. 983 (1992). The reasonableness of the expectation of privacy must have "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." ***Rakas v. Illinois,*** 439 U.S. 128, 143-44 n.12 (1978); **see also** ***Smith v. Maryland,*** 442 U.S. 735, 740-41 (1979). "Because Fourth Amendment rights are personal and may not be asserted vicariously, we must first determine whether [the defendant] had a legitimate expectation of privacy in the area searched or the item seized." ***United States v. Gomez,*** 16 F.3d 254, 256 (8th Cir. 1994) (citations omitted). The Eighth Circuit has further explained that:

> Factors relevant to the determination of standing include: ownership, possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.

Id. (citation omitted).

"If a defendant fails to prove a sufficiently close connection to the relevant places or objects searched he has no standing to claim that they were searched or seized illegally." *United States v. Stallings,* 28 F.3d 58, 60 (8th Cir. 1994), **quoting** *Gomez,* 16 F.3d at 256. "The defendant moving to suppress has the burden of proving a reasonable expectation of privacy in the area [or item] searched." *Gomez,* 16 F.3d at 256. The Eighth Circuit has recognized that:

> The Supreme Court has enunciated a two part test to determine whether a person has a legitimate expectation of privacy in the place searched or the object seized. A court must determine: (1) whether the petitioner has asserted a subjective expectation of privacy, and (2) whether the petitioner's subjective expectation is objectively reasonable.

Id. (citations omitted). Chevalier has established no standing or expectation of privacy in Reinholz's Toyota Camry, and, for that reason, her motion to suppress should be denied.

The Toyota Camry was not parked at the residence for which the search warrant was issued nor was the Toyota Camry included in the search warrant. However, the government asserts the items seized from Reinholz's Toyota Camry resulted from a search to which Reinholz consented. Officer Podany testified Reinholz orally consented to the search of the Toyota Camry, which was left parked at Reinholz's place of employment.

A voluntary consent to search, either express or implied, is a waiver of one's Fourth Amendment rights. ***United States v. Chaidez,*** 906 F.2d 377, 380 (8th Cir. 1990). The burden is on the government to prove by a preponderance of the evidence using the totality of the circumstances that the defendant's consent was voluntarily given. ***Schneckloth v. Bustamonte,*** 412 U.S. 218 (1973); ***United States v. Knight,*** 58 F.3d 393, 397 (8th Cir. 1995), **cert. denied**, 116 S. Ct. 827 (1996); ***United States v. Severe,*** 29 F.3d 444, 446 (8th Cir. 1994), **cert. denied**, 513 U.S. 1096 (1995). Numerous factors have been put forth as factors to be considered, such as: age, education, language fluency, prior criminal history, employment, advice of ***Miranda*** rights, advice as to the right to refuse consent, the absence of objection during a search, location of the search, whether or not the person was in custody or under arrest, and whether or not the person was under the influence of an intoxicating substance. **See also** ***United States v. Hathcock,*** 103 F.3d 715, 718-19 (8th Cir.), **cert. denied,** 117 S. Ct. 2528 (1997). In other words, all of the circumstances of the environment surrounding giving consent must be taken into consideration. Even where a person was illegally detained immediately prior to the consent does not automatically vitiate the consent. ***United***

States v. Thomas, 83 F.3d 259, 260 (8th Cir. 1996); ***United States v. Ramos,*** 42 F.3d 1160, 1164 (8th Cir. 1994), **cert. denied,** 115 S. Ct. 2015 (1995).

A "written consent to search is unnecessary . . . and an officer need not inform an individual that he can refuse consent to search." ***United States v. Pollington,*** 98 F.3d 341, 343 (8th Cir. 1996) (citations omitted). However, in this case, Reinholz was provided a written permission to search form which included a statement that the consenting person had a right to deny the officers permission to search (Exhibit 3). Although Reinholz declined to sign the form, he had orally given Officer Podany permission to search the Toyota Camry just moments earlier. Reinholz did not withdraw his oral permission but merely declined to sign the permission to search form. The court finds Reinholz's consent to search the Toyota Camry was voluntarily given.

D. Statements by Chevalier

Chevalier moves to suppress the statements she made to the police officers while at 6729 North 63rd Street during the execution of the search warrant. The touchstone for the admissibility of a defendant's statements is voluntariness. ***Brown v. Mississippi,*** 297 U.S. 278, 279 (1936). The court must look to the totality of circumstances in determining whether or not the statements were voluntary. ***Mincey v. Arizona,*** 437 U.S. 385, 401 (1978); ***Colorado v. Connelly,*** 479 U.S. 157 (1986); ***Schneckloth v. Bustamonte,*** 412 U.S. 218 (1973). One of the principal factors is whether or not the defendant was in custody at the time of the statements. "Custody occurs either upon formal arrest or under any other circumstances where the suspect is deprived of his freedom in any significant way." ***United States v. Griffin,*** 922 F.2d 1343, 1347 (8th Cir. 1990). Custodial interrogation requires the police to advise the person in custody of his constitutional rights in accordance with ***Miranda v. Arizona,*** 384 U.S. 436 (1966). **See also** ***Griffin,*** 922 F.2d at 1347. Failure to so advise an in-custodial defendant of such rights will render statements inadmissible made by such a defendant as a result of police interrogation. Coercive police conduct will render a confession inadmissible. ***Blackburn v. Alabama,*** 361 U.S. 199 (1960). The court finds Chevalier was in custody at the time she made statements to the police officers. While Chevalier was not placed in handcuffs during the search, Chevalier was not free to go. She was somewhat hysterical when Officer Podany talked with her. While Officer Podany testified he did not consider her a suspect until items were found in the garage, he did include her criminal record in the application and affidavit for the search warrant. When informed that various equipment was found in the garage, Officer Podany considered Chevalier a suspect, understood that Chevalier was not free to go, but still asked Chevalier questions with regard to Reinholz's involvement without advising Chevalier of her ***Miranda*** rights. The courts [sic] finds the government has failed to prove Chevalier's statements were voluntary because 1) of her somewhat hysterical condition and/or 2) of the police officer's failure to advise Chevalier of her ***Miranda*** rights. Chevalier's motion to suppress her statements should be granted.

E. Statements by Reinholz

Officers Podany and Hadcock waited outside Reinholz's place of employment on the afternoon of November 24, 1998. They had in their possession a search warrant for Reinholz's person and the residence at 6729 North 63rd Street, which had been issued on November 20, 1998. They did not have an arrest warrant for Reinholz. However, when Reinholz came out of his employment to go to his car, the Toyota Camry, the officers stopped Reinholz, identified themselves, and immediately frisked and handcuffed Reinholz. The officers placed Reinholz in back of their unmarked police vehicle and drove him to his residence at 6729 North 63rd Street. Reinholz neither consented nor objected to his treatment by the police officers. He was merely told that the officers had a search warrant for him and his residence. He was never informed of his ***Miranda*** rights until he arrived at the staging area for the search, located in the school parking lot. During the approximately half-hour trip across the city to the staging area, Reinholz asked the officers what was going on. Reinholz was told the officers would be executing a search warrant at Reinholz's residence and they would talk with him later. Reinholz asked if this was about the iodine crystals he bought. The officers, again, told Reinholz they would talk with Reinholz when they got to his residence. When the officers and Reinholz arrived at the staging area, Officer Podany got out of the vehicle and talked with other officers. Reinholz made statements to Officer Hadcock, apparently in order to shift any blame away from Chevalier. None of Reinholz's statements were prompted by questions of the officers. All were volunteered by Reinholz. When Officer

Podany returned to the vehicle, Officer Podany informed Reinholz of ***Miranda*** rights. Reinholz waived his ***Miranda*** rights and answered questions by Officer Hadcock and other officers throughout the search process until Reinholz was finally taken to Central Station for booking later that evening. Reinholz never requested an attorney or asked that any questioning cease. Reinholz was cooperative during the search and was openly concerned about what might happen to Chevalier.

One of the principal factors to determine whether statements should be suppressed is whether or not the defendant was in custody at the time of the statements. Again, custodial interrogation requires the police to advise the person in custody of his constitutional rights in accordance with ***Miranda,*** 384 U.S. 436. Failure to so advise an incustodial defendant of such rights will render statements inadmissible made by such a defendant as a result of police interrogation. The court finds Reinholz was in custody from the time handcuffs were placed on him and he was placed in the unmarked police car at his place of employment.

The court concludes from the evidence in this matter that Reinholz volunteered the statements regarding the iodine crystals while in the back seat of the police vehicle during the trip to his residence. The statements made were not the product of any interrogation of the officers. As stated by the Eighth Circuit: "***Miranda*** does not protect an accused from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers." ***United States v. Hawkins,*** 102 F.3d 973, 975 (8th Cir. 1996), **cert. denied,** 117 S. Ct. 1456 (1997).

The court further finds Reinholz's statements were voluntarily made. Whether a person's statements and actions are voluntary or not depends on the totality of the circumstances. ***Stansbury v. California,*** 511 U.S. 318 (1994); ***Connelly,*** 479 U.S. 157; ***Schneckloth,*** 412 U.S. 218; ***Knight,*** 58 F.3d at 397; ***Severe,*** 29 F.3d at 444.

1. Seizure of Reinholz

The court finds Reinholz was unlawfully seized at his place of employment on November 24, 1998, by Officers Podany and Hadcock. The officers possessed a search warrant for Reinholz's person, not an arrest warrant. The search warrant did not authorize the officers to handcuff Reinholz, place him in the back seat of the unmarked police vehicle, and drive him across the city to the OPD staging area in the school parking lot near Reinholz's residence. Reinholz neither requested to accompany the officers so they could execute the search warrant at Reinholz's residence nor did he consent to being transported. Regardless of the officer's motives for doing what they did, there was no justification for Reinholz's seizure and detention. Cases cited by the government in its posthearing brief are not persuasive on this issue. Those cases are distinguishable on the basis that those defendants were either detained pursuant to ***Terry v. Ohio,*** 392 U.S. 1 (1968), or those defendants agreed to accompany the officers back to the residences for the commencement or resumption of a search. Neither applied in Reinholz's case, and the officers violated Reinholz's Fourth Amendment rights to be free from unreasonable seizures. As such, the statements made to the police officers are subject to exclusion as fruits of the poisonous tree.

The exclusionary rule prohibits the admission of evidence unconstitutionally obtained. ***Weeks v. United States,*** 232 U.S. 383 (1914). The rule also applies to evidence, tangible and testimonial, which was derived, directly or indirectly, from the unconstitutionally obtained evidence, i.e., the "fruit of the poisonous tree." ***Wong Sun v. United States,*** 371 U.S. 471 (1963); ***Nardone v. United States,*** 308 U.S. 338 (1939); ***Silverthorne Lumber Co. v. United States,*** 251 U.S. 385 (1920).

2. Exceptions to the Exclusionary Rule

Even though the exclusionary rule may require the exclusion of all evidence obtained by exploitation of an illegal search and seizure, the evidence may still be admissible into evidence if the evidence is gained by means sufficiently distinguishable to be purged of the primary taint of the illegality. To that extent, three general exceptions have been carved from the exclusionary rule. The first exception has been called the "attenuated connection" where the chain between the challenged evidence and the primary taint of illegality is so long or only linked by sophisticated argument that exclusion of the evidence is not warranted. **See** ***Nardone v. United States,*** 308 U.S. 338; ***Wong Sun,*** 371 U.S. at 487-88. The second exception has been called the "independent source" exception where evidence is admissible if the government can show it derived the evidence from a lawful source independent of the illegal conduct giving rise to the primary taint. **See** ***Silverthorne Lumber Co. v. United***

States, 215 U.S. 385.[2] The third exception has been labeled the "inevitable discovery" doctrine where the government can establish that it would have inevitably discovered the challenged evidence without reference to the illegal conduct giving rise to the primary taint. **See** ***Nix v. Williams,*** 467 U.S. 431 (1984).

The statements Reinholz made during the trip from his place of employment to the staging area parking lot in the car should be excluded as the court finds the government has failed to show that any of the exceptions to the exclusionary rule apply. The statements made by Reinholz after he was advised of his ***Miranda*** rights in the police car in the staging area parking lot and after Reinholz was reminded of those rights when questioned inside the residence are another matter. As stated by the Supreme Court in ***Brown V. Illinois,*** 422 U.S. 590 (1975):

> Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, ***Wong Sun*** requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." 371 U.S. at 486, 83 S. Ct. at 416. ***Wong Sun*** thus mandates consideration of a

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[2] In this case, the courts [sic] finds the evidence which was discovered at the residence and in the Honda Prelude has a sufficient independent source, i.e., the search warrant, because the government derived the evidence from a lawful source independent of the illegal seizure and detention of Reinholz. Such evidence should not be excluded from evidence.

> statement's admissibility in light of the distinct policies and interests of the Fourth Amendment. If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. **See** ***Davis v. Mississippi,*** 394 U.S. 721, 726-727, 89 S. Ct. 1394, 1397, 22 L. Ed.2d 676 (1969). Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge [sic] that evidence derived therefrom could well be made admissible at trial by the simple expendient [sic] of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

Id. at 601-03. The ***Brown*** court went on to identify four factors relevant to the determination of whether statements made to the police after an illegal seizure are admissible or sufficient to constitute voluntary consent: 1) whether the suspect has been advised of his *Miranda* rights prior to making the statements at issue; 2) the temporal proximity of the statements to the Fourth Amendment violation; 3) the existence of intervening causes between the violation and the statements; and 4) the purpose or flagrancy of the official misconduct. **Id.** at 603-04.

The court finds that in applying the ***Brown*** factors, the government has not carried its burden to show that

Reinholz's waiver of his Miranda rights was " 'sufficiently an act of free will to purge the primary taint' [of the illegal arrest]." ***Wong Sun,*** 371 U.S. at 486. Reinholz was seated, handcuffed, in the back of the unmarked police car after having been driven across the city with very little explanation of what was transpiring. Reinholz's statements should be excluded.

This exclusion also applies to the oral consent to search the Toyota Camry. Reinholz had been involuntarily returned to his residence for the search. His consent is the product of his earlier illegal seizure. The government has failed to carry its burden to show that Reinholz's voluntary consent was sufficiently purged of the taint of the pervious [sic] illegal seizure. Accordingly, the motion to suppress the evidence found in the Toyota Camry should be granted.

RECOMMENDATION

IT IS RECOMMENDED TO JUDGE JOSEPH F. BATAILLON that:

1. Chevalier's motions to suppress (Filing Nos. 25, 27, 28, and 45) be denied.

2. Chevalier's motion to suppress statements (Filing No. 26) be granted.

3. Reinholz's motion to suppress (Filing No. 33) be denied as to that portion of the motion seeking suppression of evidence seized from the residence at 6729 North 63rd Street and the Honda Prelude but granted as to the evidence seized from the Toyota Camry and granted as to

that portion of the motion seeking suppression of the statements made by Reinholz on November 24, 1998.

ADMONITION

Pursuant to NELR 72.4 any objection to this Report and Recommendation shall be filed with the Clerk of the Court within ten (10) days after being served with a copy of this Report and Recommendation. Failure to timely object may constitute a waiver of any such objection. The brief in support of any objection shall be delivered to Judge Joseph F. Bataillon at the time of filing such objection. Failure to submit a brief in support of any objection may be deemed an abandonment of the objection.

DATED this 16th day of September, 1999.

BY THE COURT

/s/ Thomas D. Thalken
THOMAS D. THALKEN
United States
Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America, Appellant, vs. Eric B. Reinholz;
Margaret E. Chevalier, Appellees.

No. 00-1166

2001 U.S. App. LEXIS 9338

May 8, 2001, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Original Opinion of March 29, 2001, Reported at: 2001 U.S. App. LEXIS 5046.

OPINION: Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 8, 2001

Service: LEXSEE
Citation: 2001 U.S. App. LEXIS 9338
View: Full
Date/Time: Thursday, July 12, 2001 - 12:22 PM EDT

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IN THE COUNTY COURT OF OMAHA,
DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA)		AFFIDAVIT AND
)	SS	APPLICATION
COUNTY OF DOUGLAS)		FOR ISSUANCE OF A SEARCH WARRANT

The complaint and affidavit of Omaha Nebraska Police Officer: Steve PODANY #1066 on this 20th day of November 1998, who, being first duly sworn, upon oath says:

That the Affiant has just and reasonable grounds to believe, and does believe, that there is concealed or kept as hereinafter described, the following property, to-wit: Cocaine and methamphetamine which are controlled substances, and possession of which is illegal per Nebraska State Statutes. All monies and records used to conduct an illegal narcotics operation. Venue identifying the occupants of 6729 North 63rd Street, Omaha, Douglas County, Nebraska.

That said property is concealed or kept in, on, or about the following described place or person, to-wit: 6729 North 63rd Street, Omaha, Douglas County, Nebraska described as a light colored, split entry, single family dwelling, with the number "6729" displayed on the front of the house and/or REINHOLZ, Eric B., white male, DOB: 03/21/68, 6'0", 200 lbs., brown hair, brown eyes.

That said property is under the control or custody of: CHEVALIER, Margaret E., white female, DOB: 04/12/59, 5'5", 125 lbs., brown hair, green eyes, SSN: 482-56-9591

AND/OR REINHOLZ, Eric B., white male, DOB: 03/21/68, 6'0", 200 lbs., brown hair, brown eyes.

That the following are the grounds for issuance of a search warrant for said property and the reasons for the Affiant's belief, to-wit: On 05 October 1998, your Affiant Officer received information from a confidential and reliable source that a party REINHOLZ, Eric B., is involved in the use of methamphetamine. According to the source, REINHOLZ may also be involved in the distribution of methamphetamine. According to the source, REINHOLZ drives a gray 1990 Toyota Camry with Nebraska license plates: 1-EH326.

Upon receiving this information, your Affiant Officer initiated an investigation. During this investigation, your Affiant Officer learned that REINHOLZ was living at the address of 6729 North 63rd Street with a female named CHEVALIER, Margaret.

On Wednesday, 18 November 1998, your Affiant Officer conducted a drive-by surveillance of the address of 6729 North 63rd Street and observed two trash cans containing several white plastic bags of trash placed near the curb in front of the residence. It should be noted that Thursday is the normal trash collection day for this residence and that it appeared that the trash cans were placed in the normal place for trash collection. At approximately 2300 hours, on Wednesday, 18 November 1998, your Affiant Officer retrieved four white plastic trash bags from the two trash cans in front of the residence.

On Thursday, 19 November 1998, your Affiant Officer searched through the four bags of trash retrieved from 6729 North 63rd Street. In searching through the trash, your Affiant Officer recovered approximately twenty hypodermic syringes with residue, a brass pipe with residue, and venue items identifying the occupants of 6729 North 63rd Street as CHEVALIER, Margaret and REINHOLZ, Eric.

On Friday, 20 November 1998, your Affiant Officer sent four of the hypodermic syringes and the brass pipe to the Eastern Nebraska Forensic Lab for testing. The test results showed that the syringes tested positive for the presence of methamphetamine and the pipe tested positive for the presence of cocaine.

In checking Metropolitan Utilities District subscriber information for the address of 6729 North 63rd Street, records indicated the subscriber as CHEVALIER, Margaret E. In checking the Douglas County Computer system CHEVALIER was located with a listed DOB: 04/12/59. CHEVALIER has been arrested and convicted of past drug charges. REINHOLZ was located with the DOB: 03/21/68, 6'0", 200 lbs., brown hair, brown eyes.

Since this affidavit is being submitted for the limited purpose of obtaining authorization for a Search Warrant, Affiant Officer has not included each and every fact known to me concerning this investigation. Affiant Officer has set forth facts that Affiant Officer believes are essential to establish the necessary probable cause for the issuance of a Search Warrant.

That a nighttime search is requested because: NOT REQUESTED.

That a no-knock search warrant is requested because: NOT REQUESTED.

Wherefore, the Affiant prays that a search warrant may issue according to law.

/s/ Steve Podany #1066
OMAHA POLICE OFFICER

SUBSCRIBED AND SWORN to before me this 20th day of November 1998.

/s/ Stephen M. Swartz
JUDGE OF THE
COUNTY COURT

IN THE COUNTY COURT
OF OMAHA, DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA)
) SS
COUNTY OF DOUGLAS)

SEARCH WARRANT

TO: OMAHA NEBRASKA POLICE OFFICER: Officer Steve PODANY #1066

This matter came on for hearing on the 20th day of November 1998, upon the sworn application and affidavit for issuance of a search warrant of Omaha Nebraska Police Officer Steve PODANY #1066 and the Court, being fully advised in the premises finds as follows:

That the Court has jurisdiction of this matter pursuant to the Sections 29-812 through 29-821, Nebraska Revised Statutes, 1943, as amended.

That based upon the sworn affidavit and application for issuance of a search warrant of Omaha Police Officer Steve PODANY #1066 dated the 20th day of November 1998, that there is probable cause to believe that concealed on the premises located at: 6729 North 63rd Street, Omaha, Douglas County, Nebraska described as a light colored, split entry, single family dwelling, with the numbers "6729" displayed on the front of the house AND/OR the person of REINHOLZ, Eric B., white male, DOB: 03/21/68, 6'0", 200 lbs., brown hair, brown eyes who resides or is in control of the afore described premises, the following described property, to-wit: Cocaine and methamphetamine which are controlled substances, and possession of which is illegal per Nebraska State

Statutes. All monies and records used to conduct an illegal narcotics operation. Venue identifying the occupants of 6729 North 63rd Street, Omaha, Douglas County, Nebraska.

YOU ARE, THEREFORE, ORDERED, with the necessary assistance, to search the afore described location and/or person, for the purpose of seizing the before described property, and if found, to seize and deal with the same as provided by law, and to make return of this warrant to me within ten days after the date hereof.

IT IS FURTHER ORDERED, that execution of the Search Warrant be forthwith during the DAYTIME hours.

IT IS FURTHER ORDERED, that Omaha Nebraska Police Officer Steve PODANY #1066 make return of this Search Warrant to me within ten days after the date hereof.

IT IS FURTHER AUTHORIZED, that Omaha Nebraska Police Officer Officer [sic] Steve PODANY #1066 with the necessary and proper assistance, enter the premises described above without knocking or announcing their authority because I have found the sworn affidavit and application concerning this matter that : NOT REQUESTED.

GIVEN under my hand this 20th day of November 1998.

/s/ Stephen M. Swartz
JUDGE OF THE DOUGLAS
COUNTY COURT

RETURN AND INVENTORY

STATE OF NEBRASKA)
) SS
COUNTY OF DOUGLAS)

FILED DEC 01 1993

Officer Steve E. Podany #1066, being first duly sworn, deposes and says that on 24 Nov, 1998, I served the within warrant and made diligent search for the property described therein at the place, or person, mentioned therein, and seized and am in possession of the following described property, to-wit:

See Attached Report & Inventory

Said property was inventoried in the presence of Eric Reinholz, and a copy of said Warrant and a receipt for said property was (given to) (left at) Eric Reinholz.

Dated this 1st DAY OF December, 1998.

/s/ Steve Podany #1066
OMAHA POLICE OFFICER

SUBSCRIBED AND SWORN TO before me this 1st day of Dec, 1998.

Warrant and inventory returned to me on this 1st day of Dec, 1998.

/s/ Stephen M. Swartz
JUDGE OF THE DOUGLAS
COUNTY COURT

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. MARGARET E. CHEVALIER and ERIC B. REINHOLZ, Defendants.	)	8:99CR4 HEARING ON DEFENDANT CHEVALIER'S MOTIONS TO SUPPRESS, TO SEVER, FOR BILL OF PARTICULARS AND TO SUPPRESS; DEFENDANT REINHOLZ' MOTION TO SUPPRESS

TRANSCRIPT OF PROCEEDING

BEFORE THE HONORABLE THOMAS D. THALKEN
UNITED STATES MAGISTRATE JUDGE

April 27, 1999

(Filed May 21, 1999)

APPEARANCES:

MR. WILLIAM W. MICKLE II for the Plaintiff

MS. MARY H. BUCKLEY for Defendant Chevalier

MR. DONALD B. FIEDLER for Defendant Reinholz

* * *

Steven Eugene Podany – Direct (Mr. Fiedler)

[5] witness chair.

THE COURT: You may inquire.

MR. FIEDLER: Thank you, Your Honor.

STEVEN EUGENE PODANY

having been first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. FIEDLER:

Q. How long have you been employed by the Omaha Police Department?

A. Thirteen-and-a-half years.

Q. And can you briefly set out for the Court your experience within – what your current assignment is and how long you've been doing that?

A. For six years, I was assigned to the Uniform Field Bureau, patrol officer, and for the last seven-and-about-half years, I've been with the Narcotics Unit.

Q. And are you with the Narcotics Unit at this time?

A. Yes, I am.

Q. As part of your duties with the Narcotics Unit, I take it that – that you have to prepare affidavits and applications for issuances for search warrants?

[6] A. Yes, I do.

Q. And have you received training on how to do that?

A. Yes, we have.

Q. What training have you received?

A. There's a session in the recruit class that regards issue – or makeup of search warrants and affidavits. And

I've also gone through the 40-hour basic DE – or the 80-hour basic DEA class of drug investigations which also covers affidavits and search warrants?

Q. Is that an in-house training given by the Omaha Police Department?

A. No. That's outside with the Drug Enforcement Agency.

Q. And then I take it that your experience with affidavits and applications for issuance of a search warrant also include experience in the field.

A. That's correct.

Q. Approximately how many applications and affidavits for search warrants have you prepared?

A. I'd say in excess of 150 to 200, probably, over the last seven, eight years.

Q. So you're – and in this training, you're very familiar with those items that need to go into a search [7] warrant.

A. Yes, I am.

Q. And also the need for being truthful and accurate in the representations that you're making in the affidavits and applications for the search warrants.

A. Yes.

Q. Now, did you participate in an investigation involving Eric Reinholz?

A. Yes, I have.

Q. And would that investigation have commenced in early October of 1998?

A. Yes, it would.

Q. And ultimately this investigation led to your preparing an affidavit and application for a search warrant; did it not?

A. Yes, it did.

Q. And that was prepared on November 20th, 1998.

A. That's correct.

Q. Signed by and presented to Judge Stephen Swartz of the Douglas County Court.

A. That is correct.

Q. Now, I want to ask you some questions about the affidavit, itself, and some of the language in the affidavit. I have marked as Exhibit – Defense Exhibit 104 –

* * *

[9] out – figure out –

Q. (By Mr. Fiedler) Now, in putting these affidavits and applications together, Officer, the – the – the fifth paragraph is the portion of the affidavit and application that sets forth the – the grounds for the issuance of – of the search warrant; is that a fair statement?

A. That's correct, yes.

Q. And the preceding four paragraphs, how would you categorize those?

A. It just gives a description of what property we believe we're looking for and also the address and any suspects we wish to – to search or that we believe is in control of the – the residence that we're going to search.

Q. The – so the – the grounds for the issuance really start at Paragraph Number 5.

A. That's correct, yes.

Q. You indicate that on October 5th that you had received information from a confidential and reliable source. Do you see where that's stated there, Officer?

A. Yes, I do.

Q. And as a matter of fact, when you used the word "source" in an affidavit and application, are you – what are you referring to?

[10] A. A source of information.

Q. Do you ever use the word in – "informant" in a affidavit and application?

A. Yes. We use them both the same.

Q. Okay. Are they used interchangeably?

A. Yes, they are.

Q. The – in terms of the reliability, this particular source was a source that you had used before or had not used before?

A. Not had used bef – prior to this.

Q. So there was no real indication that this particular source had proven himself reliable in the past or – or she had in the past.

A. At this time, they – they offered the information. We were able to corroborate the information given, to an extent, and that proved their reliability.

Q. So on the – but at first – well, actually on October 5th, 1998 that particular source had not previously proven his – his or her reliability.

A. That's correct.

Q. Now, in connection with this case, there were certain items provided to us as Rule 16 discovery and I don't know – I think I – when I was up there, I saw that you had some reports in connection with this case, but I would initially refer you to what we have marked as [11] Exhibit 101 and – and ask you if you can identify that for the record, please?

A. It's a supplementary report that was written by me on, I believe, the 2nd of November, 1999.

Q. And –

A. I'm sorry, 1998, I'm sorry.

Q. And the – the details of the report in – involved information that you had received a month previously; isn't that correct?

A. That is correct, yes.

Q. All right.

MR. FIEDLER: And, again, for the Court's information, that would be Exhibit 1 in the brief.

THE COURT: Thank you.

Q. (By Mr. Fiedler) And that information concerned a party that wished to be anonymous; is that right?

A. That is correct.

Q. But it's clear from the – the information concerned in the report that that party worked with the pharmacy. Is that a fair statement?

A. I'm reading through it. Just one second.

Q. Okay.

A. It doesn't mention that this person worked for the pharmacy, no.

[12] Q. As a matter of fact, that person did work for a pharmacy.

A. Yes, he did.

Q. And the information concerned Eric Reinholz?

A. Yes.

Q. The information concerned his attempts to – to purchase iodine crystals.

A. That is correct.

Q. So in Exhibit 102 –

MR. FIEDLER: Your Honor, I'd offer Exhibit Number 101.

THE COURT: Any objection to 101?

MR. MICKLE: No, Your Honor. Although it is a two-page exhibit and the reference has been to the first page, we'd have no objections to Exhibit 01.

THE COURT: Are you offering – you're offering – may I see the exhibit, please? It's a two-page ex –

MR. MICKLE: Yes, I understand.

THE COURT: It says page – although the pagination is – it says Page 1 of 1 on top and Page 1 of 1 on – on the second page, too; is that correct?

MR. FIEDLER: Your Honor, I think what I'd like to do at this point, with the Court's permission, is remove the second page –

[13] THE COURT: We can – it wouldn't make any difference. I just wanted to make sure that – we can just call that Page 2 of the exhibit if you want.

MR. FIEDLER: Okay, that would be – that would be fine.

THE COURT: I'll – I'll just mark that here Page 2.

MR. FIEDLER: Okay.

THE COURT: Now, with that respect – and you have no objection to that; is that correct?

MR. MICKLE: No, Your Honor.

THE COURT: I have – I have marked on the exhibit handwritten 1 slash 1 slash and on the next page slash 2 slash and the exhibit will be received. (Aside: Please restaple that. Thank you.)

Q. (By Mr. Fiedler) Now, I notice that on – on that Paragraph 5, going back to Exhibit 104, that you indicate that on October 5th that you received information from a confidential and reliable source. I guess my question to you is that I don't – I haven't seen anything in the discovery that shows anything that occurred on October

5th. Could that have been October – the October 2nd report that you're referring to?

A. I believe it is. I believe it was a typographical error on the affidavit of the – of the 5th. [14] I believe it should have been the 2nd, yes.

Q. So the information that you received is contained in Exhibit 101 but yet you indicate that the source said that on that date that Eric Reinholz was involved in the use of methamphetamine.

A. I'm sorry. I didn't understand the question.

Q. Okay. Your affidavit and application says – and thank you for having cleared that up – that on October 5th, which should be October 2nd, your affiant officer received information from a confidential and reliable informant that a party, Reinholz, Eric B., is involved in the use of methamphetamine.

A. Correct.

Q. But looking at Exhibit 101, the pharmacist indicated to you that Eric Reinholz had ordered iodine crystals from a pharmacy.

A. Correct.

Q. So, in fact, the information that you had received from this anonymous source did not concern the use of methamphetamine, did it?

A. It did. I just did not include that in the – in the original information.

Q. The pharmacist did not indicate to you that Eric Reinholz came up and said, I want iodine crystals for methamphetamine, did he?

[15] A. No, he did not.

Q. Isn't it a fact that as an officer who has been investigating drugs for seven-and-a-half years that you have some familiarity with how methamphetamine is made and manufactured?

A. I do. Yes, I do.

Q. And is it also not a fact that you have awareness that a – a – a precursor, I guess, for lack of a better term, or an ingredient for the making of methamphetamine would be iodine crystals?

A. Yes, it is.

Q. And that you have over the – the course of the years have tried to get the pharmacies to cooperate with you when someone tries to purchase iodine crystals.

A. Yes, we did.

Q. And have there been – and I assume that there's been correspondence that you're aware of from either the Omaha Police Department or the Drug Enforcement Agency or the FBI or somebody to see learning pharmacists that they ought to contact law enforcement if somebody attempts to purchase iodine crystals?

A. Yes, there has been.

Q. And in connection with that – those sort of memos that have gone out to pharmacies, is that where this particular call came from?

[16] A. From the information received by the pharmacy?

Q. Yes. And –

A. In exchange for the information we – that has been sent out to them?

Q. Yes.

A. Yes. That's how the information came to us, yes.

Q. The actual – the actual use of the iodine crystals is – is not necessarily limited to the use of methamphetamine, though, is it?

A. As far as I know, yes, it is. There's one other use of it, yes, that I'm aware of.

Q. And in – when the – if I could refer you to Exhibit 1-0 –

MR. FIEDLER: Just one second, Your Honor –

THE COURT: Um-hmm.

Q. – 106, I believe it is. This is a multi-page exhibit and I'll ask you to go through and –

MR. FIEDLER: Your Honor, seeing how these are marked, what I'd like to do is have this marked as Exhibit 107.

THE COURT: All right.

MR. FIEDLER: (Aside: Do you see what I'm doing? Do you see what I'm doing there? Just – thank you.)

[17] Q. (By Mr. Fiedler) I'll show you what's marked as Defendant's Exhibit 107. Could you identify that for the record, please?

A. It's an 11-page report concerning the execution of the search warrant at 6729 North 63rd Street. It's dictated by myself.

Q. I'll get to that in just a second. I see that I picked up the wrong set of – do you have Exhibit 102 up there?

A. Yes, I do.

Q. Oh, okay. That – that was the problem. I'm sorry.

And will you identify Exhibit 102, which is Exhibit 2.

A. It's a five-page supplementary report dictated by Sergeant Ray Fidone concerning a surveillance that was taken [sic] place on Wednesday, 21st of October – at approximately 1100 hours on October 21st, 1998.

Q. And I assume that you and Officer Fidone were aware – or Sergeant Fidone were aware that – of the fact that both of you were working on the case.

A. Yes. Sergeant Fidone's my sergeant, yes.

Q. Okay. And in preparation for the affidavit and application for the search warrant, you would have read the report that had been filed by other [18] investigating officers in this case?

A. Yes, I would have.

Q. And including the report of Sergeant Fidone.

A. That is correct.

Q. And in – this report is a standard report from the Omaha Police Department, a standard business record?

A. Yes, it is.

MR. FIEDLER: And we would offer Exhibit 102.

THE COURT: Any objection?

MR. MICKLE: No, Your Honor.

THE COURT: 102 will be received.

Q. (By Mr. Fiedler) Now – and you're familiar with the contents of this report, you've previously testified?

A. I haven't read it for some time, but basically, yes.

Q. But it – but you indicated that you had read it while you were preparing the affidavit and application for the search warrant.

A. Yes.

Q. I would refer you to Page – the bottom of Page 3 of the report to the top of the first paragraph of Page 4 and ask you if you could review that for a second, starting with the line "Kohll advised reporting [19] "sergeant. . . . " and then I have a question or two for you on that.

A. I'm sorry. Starting where, sir?

Q. At – at the bottom of the last – starting at the third line from the bottom of Page 3, "Kohll advised –"

A. Oh, okay.

Q. "– reporting sergeant. . . . "

A. Yes, sir.

Q. And the information that you had received through Sergeant Fidone was that Mr. Reinholz had given an explanation of why he was using the iodine crystals.

A. He gave two explanations, yes.

Q. Yes. One was to clean tools and the other was for a special paint design on a vehicle.

A. That is correct.

Q. And in connection with your affidavit and application, you did not include that information in there, did you?

A. No, I did not.

Q. And, in fact, iodine crystals can be used for purposes of cleaning tools; isn't that correct?

A. I attempted to verify that and could not verify that.

Q. And for purposes of preparation for paint jobs [20] that that is also another use?

A. I attempted to verify that and could not verify that either.

Q. But you weren't able to exclude that.

A. No, I was not.

Q. And your attempt to verify that was made not at the time that you did you affidavit and application for search warrant, was it?

A. We had learned previously in the – in classes that I have attended that – would you rephrase the question? I'm sorry.

Q. It was in reference to when you did the verification. It wasn't done at the time you prepared your affidavit and application for search warrant, was it?

A. Prior to that, during the investigation, yes.

Q. The source that you had on October 5th also – you also indicated that Reinholz had said that he was involved in the distribution of methamphetamine.

A. That is correct.

Q. And as a matter of fact, there was nothing that appears in your report on Exhibit 101 that would indicate that he said that to you –

A. Not in that –

Q. – is there?

[21] A. Not in that report, no.

Q. And there is – on the second page of that report, there is nothing in there that indicates that Reinholz was distributing methamphetamine, is there?

A. Not in that report, no.

Q. Now, after you received this information, you started an active investigation of Eric Reinholz.

A. Yes, I did.

Q. And that would have been on or about October 2nd, 1998.

A. That'd be correct.

Q. You tried to ascertain where he lived?

A. Yes, we did.

Q. Tried to ascertain where he worked?

A. Yes, we did.

Q. You would do periodic surveillances of him?

A. Yes, we would.

Q. Surveillances that would have been tied up to times that he would come into Kohll's Pharmacy.

A. That is correct.

Q. And once you were able to find out where he worked and lived, there were other surveillances that were going on.

A. Yes, there were.

Q. And the purpose of a surveillance for law [22] enforcement is what?

A. To verify information I had received, to see if we could make a case against someone.

Q. Want to see what their habits are?

A. That is correct.

Q. If they are doing things that are consistent with what you suspect them of doing.

A. That's correct.

Q. And in this particular case, you – you – you did certain – followed certain investigative techniques.

A. Yes, we did.

Q. You – in addition to what we've already mentioned, did you also go and drive by the residence of 6729 North 63rd Street?

A. Yes. On several occasions.

Q. And when you were driving by, did you check to see what vehicles were there?

A. Yes, we would, on occasion.

Q. And if there was a vehicle there, would you, on occasion, write down the license plates of the vehicles that were there?

A. Yes, we would.

Q. And the – then would you check those license plates to see who the owners of those vehicles were?

A. Yes, we would.

[23] Q. The purpose of that would have been to see if there was anyone known to you who was a known user or distributor of methamphetamines or other drugs?

A. Not only known, but unknown, yes.

Q. And you were unable to ascertain the names of any vids – any individuals that were known to you that were involved in the distribution of any drugs seen at the address of 6729 North 63rd Street.

A. At that only – at the residence only –

Q. Yes.

A. – or other places he'd visited?

Q. At that residence only.

A. No, there was no other vid – individuals indentified.

Q. The – one of the other things that you would do is remove trash from 67 North 29th – I'm sorry, 6729 North 63rd Street?

A. Yes, I did.

Q. You did that on more than one occasion?

A. No. I just did that on one occasion from that residence.

Q. In the affidavit and application for the search warrant, you indicate that, in Paragraph 7 which spills over to Par – Paragraph 1 on Page 2, that you had removed some trash from the residence of 6729 North 63rd [24] Street.

A. That is correct.

Q. And that in addition to that, that you had the – the next paragraph, that you had that – you went through the trash the next morning and found some syringes and a – and a pipe and some venue items?

A. That is correct.

Q. And then the following day, you had those items sent for a test to the Nebraska Forensic Lab.

A. That's correct.

Q. And that you got the test results back that same day.

A. That's correct.

Q. Now, you checked the record, you indicate, of Margaret Chevalier; is that right?

A. Yes, it is.

Q. But that you didn't – I assume that you checked the record of Eric Reinholz.

A. Yes, we did.

Q. And found that Eric Reinholz had no record.

A. That is correct.

Q. But, yet, that was not included in your affidavit and application for issuance of the search warrant.

A. We just did what the – they didn't have any [25] record that he was located in the computer under a date of birth and description, but not his – of his past record, no.

Q. So you didn't include it.

A. That is correct.

Q. Now, when you prepared reports, I take it that – that in your earliest training you received an education on how to put reports together.

A. Yes, I did.

Q. You are aware that the reports are a very important part of – of the process in – in cases that result in arrests and prosecution?

A. Yes.

Q. You prepare reports to refresh your own recollection for later on.

A. Yes, I do.

Q. For other officers that are going to be reviewing your reports?

A. Yes.

Q. And as a way of making a record that possibly can be scrutinized time and time again throughout the prosecution process.

A. Yes.

Q. And so when you received the information from Offi – from this pharmacist on October 2nd, 1998, you [26] wanted to put down all the pertinent information that you had received from him at the time that you spoke with him.

A. Yes, most of the information, yes.

Q. I didn't hear the last part of your answer.

A. Most of the information, yes.

Q. But it's your – your testimony that – that other than the – the – the iodine crystals were the only thing that – that you put into the report; is that right?

A. That's right.

Q. And, as a matter of fact, you had not received any information at the time that you filled out the affidavit indicating that any source had actually seen Mr. Reinholz use methamphetamine?

A. No, I had not.

Q. And you had not received any information from any source at that time that anyone had actually seen Mr. Reinholz distribute methamphetamine.

A. No, we had not.

Q. You didn't indicate in your report that this source was a pharmacist?

A. At the beginning, no, we did not.

Q. Nor did you indicate in this report that the source had – was not someone that had contacts in the so-[27] called world of drug delivery?

A. No.

Q. You did not include in the report that you were able to discover any evidence that would have been consistent with a – a drug distribution network?

A. No, we did not.

Q. Nor that there was an unusual amount of traffic coming and going from the Reinholz residence?

A. No.

Q. And, in fact, there wasn't any evidence of a drug distribution network, was there?

A. From that residence?

Q. Yes.

A. As far as traffic, no.

Q. And there wasn't – did you also check to see, in reviewing this matter, about Mr. Reinholz' style of living, his – the type of cars he was driving, things like that?

A. As far as –

Q. Determining whether or not he was living beyond his means.

A. In – in the history I've worked with narcotics, not all drug dealers drive Porsches and BMWs and Mercedes. Numerous people we've arrested drive everyday cars, Toyotas, station wagons, that sort of [28] vehicle, so –

Q. What you're saying is that that's not necessarily a relevant factor.

A. Their lifestyle? No.

Q. Okay. And you probably, as part of your investigation, checked to see whether or not – what sort of phone service Mr. Reinholz had.

A. No. We had no indication – or we had – other than a phone number left at the – a pharmacy, no, we don't go and check phone records as far as what service they might have, no.

Q. Now, when you presented the affidavit and application to Magistrate – I'm sorry, to Judge Swartz, you didn't indicate to him that this source was a pharmacist, did you?

A. Did I? No, I did not.

Q. You reviewed the affidavit and application in Exhibit 104 before you presented it to Judge Swartz?

A. Yes, I did.

Q. And you were aware of the contact therein?

A. Yes.

Q. You were aware that if someone would read this, a – a reasonable person, a reasonable judge, that they could glean from this information that a confidential and reliable source would – would – would– [29] involved with drugs would probably mean someone in the drug distribution network or an informant?

MR. MICKLE: Objection. Foundation and form.

THE COURT: Sustained.

Q. (By Mr. Fiedler) You had indicated previously that the word "source" is used interchangeably with the word "informant."

A. By myself, yes.

Q. And in affidavits and applications for issuance of search warrants that you prepared.

A. Yes.

Q. And by preparing the affidavit in the way that you did – and I'm specifically referring you to Page – or to Exhibit 104, Paragraph 5 on your affiant officer received information from a confidential and reliable source that a party, Eric Reinholz, is involved in the use of methamphetamine, would you agree with me, Officer, that a reasonable individual or even a magistrate or judge who, I assume, is reasonable would assume from that, that that source had actually seen Reinholz using methamphetamine?

MR. MICKLE: Objection. Relevance and foundation.

THE COURT: Overruled.

A. Can you repeat the question, please?

[30] Q. (By Mr. Fiedler) I'm sorry?

A. Can you repeat the question, please?

Q. (Laughing) Okay.

THE COURT: Don't make it so convoluted next time. He might be able to – okay.

Q. (By Mr. Fiedler) (Laughing) Would – would you agree that the phrasing of on October 5th, 1998, your offi – affiant officer received information from a confidential and reliable source that a party, Reinholz, Eric B., is involved in the use of methamphetamine, would lead a reasonable person to believe that – that that source had seen Reinholz used methaphetamines?

MR. MICKLE: Same objection. Relevance and foundation.

THE COURT: Overruled.

A. Not all the time. We receive information sometimes third party, that they know a person who knows this person and they just pass that information on that came from another source, so not always is that that they have direct contact with a suspect, seeing them using methamphetamine, no. Sometimes it comes secondhand. So not a hundred percent, no.

Q. And – but the secondhand source would have been that someone would have seen the person using methamphetamine. You didn't have a secondhand source in [31] this case.

A. No, we did not.

Q. And the implication would be is that – from that sentence, you either had a firsthand source, a direct eyewitness or a secondhand source; isn't that a fair statement?

A. Sure, yes.

Q. And – and – and – and following along that line, the next line: "According to the source, Reinholz may also be involved in the distribution of methamphetamine." That would lead a – a – a – a magistrate, if he was reading that, to believe that that person either on a first- or a secondhand basis, was aware that Reinholz was, in fact, selling methamphetamine.

MR. MICKLE: Objection. I'm sorry to interrupt. Relevance and foundation.

THE COURT: Overruled.

A. That he may be involved in it, yes.

Q. (By Mr. Fiedler) And that would be a reasonable interpretation based off of the words that you put in there.

A. Yes.

Q. And you knew that at the time that you wrote [32] that.

A. Yes, I did.

MR. FIEDLER: That's all I have.

THE COURT: You may cross-examine.

MR. MICKLE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MICKLE:

Q. Officer Podany, what training have you had in the eradication or dismantling or identification of clandestine laboratories?

A. I've attended a 40-hour class sponsored through the Drug Enforcement Agency, specifically trained in the dismantling and the investigation of clandine (sic) labortories.

Q. And in that training, have you identified a use of iodine in the manufacture of methamphetamine?

A. Yes, we have.

Q. And what component or what part or what role does iodine play in the manufacture of methamphetamine?

A. It's mixed with pseudoephedrine along with red phosphorous. It contains its own he source – heat source from that chemical reaction. And as a result of that steps and other steps, methamphetamine can be produced.

Q. You testified on direct that you were aware of a legitimate source – or a legitimate purpose for the use [33] of iodine, other than the manufacture of methamphetamine. Can you identify what that legitimate use is?

A. During class we were told that as far as – as they'd been able to find, that iodine crystals are only used with farriers, who is like a horse veterinarian, to – sometimes horses get an infection in the hoof and that is used to burn the infection out of the hoof. And that's the only other use of iodine crystals they're able to identify.

Q. I turn your attention to Paragraph 5 of the affidavit and application, Exhibit 104. You've initially identified that the October 5 date that you say is a typographical error, that it should be October 2. But read through that sentence: "Your affiant officer received information from a confidential and reliable source." Do you receive information from other types of sources other than confidential informants?

A. Yes, I do.

Q. Do you, in fact, receive information from citizen sources?

A. Yes, we do.

Q. Mr. and Mr. John Q. Public, if you will, who are not involved, to your knowledge, in the illegal distribution of controlled substances?

A. That's correct, yes.

[34] Q. And, in fact, wasn't this, quote, confidential and reliable source a pharmacist at Kohll Drug?

A. Yes, he was.

Q. And did he contact you and other officers to tell you about this person who had come in to buy the iodine crystals?

A. Yes, he did.

Q. Why did you list the person as a, quote, confidential and reliable source"?

A. The first time we spoke with him, he didn't want his – his identity revealed. The information that he was able to give us, as far as a license plate number and a name, we were able to verify that the license plate came back to that individual. The physical description that he supplied to us matched the individual we were able to locate. And that's what we made – that's how we made him reliable, the information he gave was able to substantiate through other means.

Q. The last sentence of that paragraph: "According to the source, Reinholz drives a gray 1990 Toyota Camry with license plates 1EH-326." Was that information received from this pharmacist at Kohll Drug?

A. Yes, it was.

Q. And was that information you corroborated or attempted to obtain corroboration through to identify [35] whether this pharmacist was reliable?

A. Yes, it was.

Q. Reading on through that sentence: " . . . that a party, Reinholz, Eric B., is involved in the use of methamphetamine." What information did you receive from this pharmacist that led you to put that information in that paragraph of the search warrant that day?

A. It was his opinion that they also – I don't know how he knew that but – knew that iodine crystals was used in the manufacture of methamphetamine, that they don't have a lot of people coming in – in fact, that was one of the things he stated, that that's the only time they've had anybody order iodine crystals. It's not an everyday thing that – that someone would ask for. They believe that anybody that would be ordering that would be using it to manufacture methamphetamine. And that was his opinion what it would be used for.

Q. Did he, the pharmacist, express that to you at the time you received the information –

A. Yes, he did.

Q. – that in his opinion this Eric Reinholz is involved in the use of methamphetamine?

A. Yes.

Q. You also say in your application affidavit, "According to the source, Reinholz may be also – may also [36] "be involved in the distribution of methamphetamine." Did you receive that information from this source, this pharmacist?

A. Yes, I did.

Q. What information did you receive from this pharmacist to lead you to put that information into the affidavit?

A. That, again, was his opinion due to the amount of iodine crystals that were being ordered through Kohll's Pharmacy. It just led him to believe that the amount that was being ordered and the – the frequency that it was being ordered, it would be someone indicative of possibly selling methamphetamine, not just for personal use.

Q. Did this pharmacist tell you that in his opinion, or in paraphrasing, in my opinion, it's used – it's a larger quantity so that it would be involved in the distribution of methamphetamine?

A. That was his opinion. That's what he told me, yes.

Q. And he said that to you about the same time or in the same meeting that you said that you say he told you that Eric Reinholz is involved in the use of methamphetamine?

A. Yes.

[37] Q. The same time that he –

A. Yes, it was. Yes.

Q. Why didn't you put that in your report, Exhibit 101?

A. Basically, it was just an opinion. We were able to substantiate that information. It was just kind of my knowledge that, you know, as long as the investigation continued we might be able to prove that in the – in the – in the future, but at that time, in was just a – the initial report is just kind of an opening of a case, real quick information, just kind of to get the case rolling.

Q. And I note that you, according to the first page of Exhibit 101, you dictated the report on 2 November 1998 concerning information that occurred on October 2 of 1998. Why did you do that?

A. For the first month, we just kind of spot-checked. We didn't really have an investigation going. And once we started getting more information is when I started the open file.

Q. You contained – or placed no information in the affidavit, an application regarding whether you were able to identify whether Mr. Reinholz had a telephone or a pager device; is that right?

A. That's correct.

[38] Q. In your experience with these search warrant applications and affidavits that you've written, have all the drug dealers that you've been involved with searching, have they had in their possession pagers or cellular telephones?

A. Not all of them, no.

Q. And, in fact, have there been instances where short-term traffic in and out of a target residence doesn't exist because the drug dealer wants to keep that target residence secret?

A. Yes, it is.

Q. Officer Podany, when you presented the information to the District Court judge at Douglas County, did the information that you con – placed in the affidavit application, was that information accurate?

A. Yes, it was.

Q. And were you present when the judge signed the search warrant, itself?

A. Yes, I was.

Q. Did the judge ask you for additional information or did you supplement this written affidavit and application with any oral information to the judge at the time you presented it to him?

A. No, I did not.

Q. Did you believe that you had authorization to [39] search the residence after the judge signed the affidavit – or excuse me, affida – affidavit and the search warrant?

A. Yes, I did.

Q. And did you rely on that judge's signature to search the residence there at 6729 North 63rd Street?

A. Yes.

MR. MICKLE: No further questions.

THE COURT: Redirect?

MR. FIEDLER: Yes.

REDIRECT EXAMINATION

BY MR. FIEDLER:

Q. You had indicated on cross that the pharmacist, at the time you talked to him on October 2nd, wished to remain anonymous.

A. At the first call, yes.

Q. But as the time went on, that pharmacist no longer made his anonymity a part of his involvement in the case, did he?

A. No, he did not.

Q. And as a matter of fact, on October 20th, 1998 in Exhibit 102, there is a pharmacist that's identified as an E. Lee Knepper, K-n-e-p-p-e-r, and then there's another pharmacist involved named Justin Kohll, K-o-h-double l.

[40] A. That's correct.

Q. And one of those two pharmacists was the one that had provided the information on October 2nd, weren't they?

A. Yes, they were.

Q. So when you went and put in the affidavit that a reliable and confidential source at – on Paragraph 5, at that point in time, that source really wasn't seeking confidentiality, was he?

A. On the 5th of October, he was, yes.

Q. But on the 20th of November, he wasn't.

A. That's correct. Act – actually –

Q. Well – thank you.

MR. MICKLE: Your Honor, may he be allowed to answer the question.

THE COURT: You can – no, because I think he answered the question.

MR. MICKLE: Thank you.

MR. FIEDLER: That's all I have, Your Honor.

EXAMINATION

BY THE COURT:

Q. Officer Podany –

A. Yes, sir.

Q. – I want to be clear in that the source you referred to in your affidavit, and the only source in [41] there, the confidential and reliable source, as you put it, was the pharmacist; is that correct?

A. That's correct, sir.

Q. Nobody else.

A. No one else.

Q. And the information that this pharmacist gave to you concerning Rein – Reinholz being a user of methamphetamine was what?

A. It was his opinion.

Q. What was – what was his opinion? What did he say?

A. That iodine – people ordering iodine crystals through a pharmacy and that he was aware of no legitimate use for those under than the manufacture of methamphetamine, that he believed this individual, in ordering those iodine crystals, was – was using that strictly for the production of methamphetamine.

Q. He had no independent knowledge other than Mr. Reinholz' – or this person, Reinholz' purchase of the crystals; is that right?

A. That's correct, yes.

Q. So – I mean, he didn't – knowing from the neighborhood, he didn't have information from anybody else, it was solely on the basis of what he purchased from the pharmacy.

[42] A. That's correct, sir, yes.

Q. Okay. And part of that is also – was that part of his opinion generated by information in these flyers that the DEA and the OPD gave to pharmacies around the city, or was that something independently on his own?

A. I didn't ask that, and I don't know if he's received any additional training in – in the – I don't – I don't know, sir.

Q. All right. So you don't know the source of his opinion.

A. No, I do not.

Q. All right.

THE COURT: If those questions prompt questions by either side, you may now inquire.

Mr. Fiedler?

MR. FIEDLER: I don't have anything further.

THE COURT: Mr. Mickle.

MR. MICKLE: No, Your Honor.

THE COURT: You had your opportunity. You may – do you have –

MR. FIEDLER: No, I have nothing.

THE COURT: You're temporarily excused, Officer, because I take it you're going to need the officer –

MR. MICKLE: Yes.

* * *

[49] MS. BUCKLEY: It was, Your Honor.

THE COURT: And – and that's your basic – and that's your basic motion on 27 was – I mean, 28 is the residence. That's your basic motion; right?

MS. BUCKLEY: I just have to leaf through all my motions.

THE COURT: Well, let me make sure here. That's the one you filed on March 18th, '99 and it's called –

MS. BUCKLEY: Yes.

THE COURT: No, got that. That's the Honda, sorry. That – giving the March 18th, 1999, and it's called Defendant's Motion to Suppress Evidence Residence and Request for Evidentiary Hearing.

MS. BUCKLEY: Yes, Judge.

THE COURT: That's Number 28.

MS. BUCKLEY: That's correct.

THE COURT: All right.

MS. BUCKLEY: Judge, if I – oh, I'm sorry, this –

THE COURT: Go ahead.

MS. BUCKLEY: – is the wrong time. I'm interrupting into Mr. Mickle's presentation.

THE COURT: With reference to what?

MS. BUCKLEY: As long as we refer to my Filing [50] 45, I would just ask to renew that request on behalf of Miss Chevalier to – to join in with Mr. Reinholz' *Franks* motion.

THE COURT: All right. Well, that'll be denied. I previously said that you can make use of the evidence but you may not have a *Franks* hearing. I mean, you will have the record here and you can argue from that, but you cannot produce additional evidence in that matter, so that's why your motion is denied.

MS. BUCKLEY: I understand.

THE COURT: So Filing Number 45 is not the actual motion to suppress. It's really for a *Franks* hearing.

MS. BUCKLEY: That's correct, Your Honor.

THE COURT: All right. So therefore 45 will be denied, and – because that is not one that I have to do an R and R on. That's anoth – that's not a dispositive motion. Okay.

Now, there's been an offer of evidence. Is there objection?

MS. BUCKLEY: I think –

MR. FIEDLER: The only thing is is that – I don't know if the Court wants to do this for every hearing, but one of the exhibits that was offered, the affidavit and application for a search warrant, is

* * *

[54] would issue a warrant on the basis of – unless he was told the – that this – the reason that he's a user of methamphetamine and this is because a pharmacist had an opinion about that, some pharmacist that this – this officer had never dealt with before and so forth.

So my inclination in this matter is to excise Paragraph – that paragraph from the affidavit and application for the search warrant. I am concerned, although it is not as – in the other paragraph where he failed to include that the Defendant Reinholz had no record. He could have done that. That's exculpatory information which he – could have been placed in there. I don't know that that's – I don't know that would have been any factor in the matter in view of the fact that the Defendant Chevalier had a drug record. So the fact that one of the subjects had a drug record is in there.

My concern, then, is how do you salvage the affidavit on the basis of a trash search with hypodermic needles and a pipe with methamphetamine residue. Does that salvage – does that provide sufficient probable cause for the issuance of a search warrant for a residence? And I need you to address that.

MR. MICKLE: Thank you. Let me back up first. Obviously, I take a different position as far as what's in the affidavit and application. The magistrate or the

* * *

[63] It's – the – the affidavit without that paragraph is – is deficient, not enough probable case.

THE COURT: Miss Buckley.

MS. BUCKLEY: Judge, I – I'm not going to repeat everything Mr. Fiedler just said, but I would adopt those comments as those of Miss Chevalier. In addition, I guess, at this time, I would ask that the Court take judicial notice of Miss Chevalier's Pretrial Services report, in particular her criminal record, the section of that report.

THE COURT: Well, I'm not going to be able to do that because that's presenting additional evidence with respect to this matter –

MS. BUCKLEY: I understand.

THE COURT: – and I've not allowed you to do that.

MS. BUCKLEY: Okay. At any rate, Judge, I – I just don't see that there is probable cause in this affidavit and application absent Paragraph 5.

Since, Judge, we just received, just now, the return on the search warrant, I just want to raise one additional matter that struck me. On Page –

THE COURT: I guess I have an incomplete Exhibit 1, Mr. Mickle, because I don't have the attached inventory, and it says see attached inventory to the

* * *

Steven Eugene Podany – Direct (Mr. Mickle)

[92] A. Yes, there were.

Q. And were those seized as part of the search warrant?

A. Yes, they were.

Q. Let me ask, also, Officer Podany, were there items seized from different areas of the residence?

A. Yes, there were.

Q. Including the garage?

A. Yes.

Q. When was the 1985 Honda searched?

A. Probably about 45 minutes to an hour after we made entry into the residence.

Q. Was that before or after you searched the interior of the residence?

A. It was after.

Q. And was that before or after you searched the garage area of the residence?

A. After.

Q. Where were the items of evidence seized, from what location within the residence?

A. There was items seized in the – what we believed to be the master bedroom upstairs and also the garage area.

Q. What led you to search the 1985 Honda?

A. Sergeant Fidone had, while I was searching the [93] garage, had walked by the – the vehicle and looked in the window – excuse me – and observed a box full of items in the front seat and some other items in the back seat which he believed might be used in the manufacture of methamphetamine.

Q. And did he relay that information to you?

A. Yes, he did.

Q. You say that he told you he was standing there on the driveway looking in through the windows of the car?

A. That's correct, yes.

Q. Did you then go to the vehicle?

A. Yes, we did.

Q. Did you see what Mr. – or Sergeant Fidone had informed you?

A. Yes, we did.

Q. Looking through the window, there were items there on the seat of the vehicle?

A. Yes, there were.

Q. Were those suspicious items?

A. Yes, they were.

Q. And can you tell the Court generally what you saw when you stood there on the ground and see –

A. You could see a – like an Olhaus (ph) triple beam (ph) scale, several jars with fluids inside of them.

* * *

[96] and he said yes, that would be fine.

Q. What did you say and what did he say during this interview?

A. During that interview, I advised him that we had found items in the garage consistent with – consistent with the manufacture of methamphetamine and asked him if, in fact, he had been manufacturing methamphetamine inside the residence. And he stated yes, that he had. I asked him when the last time it was the he had manufactured methamphetamine in the residence, and he stated the last cook he did was approximately two days before our execution of our search warrant. He advised me that he was an addict to methamphetamine. I asked him if he ever sold any methamphetamine or gave any other methamphetamine out. He stated that he had never sold any.

I asked him if Miss Chevalier had ever received any methamphetamine or used any methamphetamine which he had produced. He stated that she had received methamphetamine from him, that she was an occasional user of methamphetamine in the residence.

Q. Did you ask him where he had manufactured the methamphetamine?

A. Yes, I did.

Q. And what was his response to that?

* * *

Steven Eugene Podany – (Examination by the Court)

[134] that right?

A. That's correct, sir.

Q. And how many officers are involved in this search?

A. I believe we had an additional six to eight officers.

Q. Additional. That means other than you two –

A. That's correct.

Q. – that went up? All right.

A. Yes.

Q. So there's six to eight officers waiting at the staging area.

A. That's correct.

Q. All right. Which is a couple blocks away from the house.

A. Yes, sir.

Q. What – why did you take Mr. Reinholz in custody? Did he con – did he – well, just let me ask you that. Why did you take him into custody?

A. To –

Q. Did you have a –

A. We had – the search warrant covered his person, and we were unable to complete a thorough search of his person outside in that area, outside his – his place of employment. We were unable to search him [135] thoroughly at that point.

Q. Your – your statement is that you couldn't – two officers there couldn't search Mr. Reinholz' person there at his place of location there?

A. Out in the street area or in the parking lot, no, we wouldn't want to do a strip search on him outside in the parking lot, no, sir.

Q. There was no other place to do that?

A. I suppose we could have asked the employer if we could have used the restroom area in there and complete it at that time.

Q. And the route that you took to get to 6729 North 63rd Street was what?

A. The Interstate.

Q. And why did you take the Interstate versus, let's say, for example, 72nd Street which would be a more direct route? Would that not be right?

A. Well, we figured the Interstate would be more of a direct route with rush hour on 72nd Street at 5 o'clock in the evening. We'd be able to get up on the Interstate and get off the Interstate and come off 72nd to Reddick which is a less congested area than 72nd is from – from L – or from Center Street north to – to Ames.

Q. Well, did you encounter the traffic block or jam right on 680 as you made the turn from 80, during [136] rush hour?

A. It wasn't the heaviest that I've seen it.

Q. Okay.

A. We were able to flow through there without stopping.

Q. Did you make a concerted effort to take a longer route in order to give you more time to discuss matters with Mr. Reinholz?

A. No, sir. We hadn't discussed anything with him in the vehicle.

Q. Did Mr. Reinholz consent to come with you, rather than being taken?

A. He nor – consented or refused to come with us.

Q. At the time, you had a radio in your vehicle?

A. Yes, sir.

Q. And you were in contact with your search team at the staging area?

A. Yes, sir.

Q. And you could have radioed them to commence the search of the – of the residence at that point?

A. Again, we were concerned with the safety issue of the – of a clandestine laboratory. They were not outfitted if we were – if we were to learn that there was an active lab in there, they were not outfitted properly to execute the search warrant, we would have had [137] to back off and made other plans.

THE COURT: If those questions prompt questions by either side, you may now inquire.

Mr. Mickle?

FURTHER REDIRECT EXAMINATION

BY MR. MICKLE:

Q. Mr. Podany, did you stop at any time from the time you took Mr. Reinholz with you at five after 5 to the time you arrived at the staging area at 5:25?

A. No, sir.

Q. Did you go to any other alternative location other than to the staging area?

A. No, we did not.

Q. Can you describe the traffic that you had took – or that you encountered while you were transporting Mr. Reinholz from his place of business to the residence?

A. From 84th – or from F Street to 84th, getting on the Interstate, it wasn't backed up at all. Westbound on I-80 was not backed up. We did – traffic did slow down a little bit coming around the bend there at Pacific on 680. Once we got past Maple Street, it was clear all the way to the staging area.

Q. Did you proceed from his place of employment to the staging area with all due dispatch?

* * *

Steven Eugene Podany – Further Cross (Mr. Fiedler)

[142] A. Yes, sir, I did.

Q. Now, you didn't give Mr. Reinholz any choice about whether he was going to come with you or not out there at Logan Construction Company, did you?

A. No, sir.

Q. So you didn't ask for his consent.

A. No, I don't believe I did.

Q. And I believe that you said that he was not free to leave.

A. That's correct.

Q. So you – you – your reason for picking him up there, if I understand this correctly, was that you wanted to gain a peaceful entry into the house; is that right?

A. We were concerned with if there was an active, clandestine laboratory inside that residence. And part of that was our safety.

Q. Okay. And you have things that you can wear for your safety?

A. If there was an active lab in that residence?

Q. Yes.

A. I was the only officer there that would be able to have protective clothing. None of the other officers had that type of protective clothing, and it would have taken several hours to get enough personnel [143] from across the state to execute the search warrant if we thought there was an active lab in that residence.

Q. And you weren't sure.

A. At the time? No, we were not.

Q. But yet you didn't go – you went where he was at work. You didn't go initially right – you went there as opposed to going out to where the search warrant was supposed to be executed.

A. The search warrant was in my name. I have to execute that search. I have to be present at that search warrant.

Q. You didn't have –

A. Part of the search warrant –

Q. Go ahead.

A. Part of the search warrant covers him so I had to be there at that point and transport him back to the house and then execute the search warrant.

Q. So your testimony is it was necessary for you to be present when he was placed in custody at work. It was also necessary for you to be present when you entered the house.

A. Correct.

Q. There are other officers that are assigned to your unit that are trained in executing search warrants of meth labs, aren't they?

[144] A. In my unit, no, there is not.

Q. You could have gone directly to the –-the house and executed the warrant to the house without having to pick up Mr. Reinholz first.

A. Yes, we could have.

Q. And the time of the execution of the warrant would have been such that you could have done that during daylight hours.

A. Yes, sir.

Q. And it also was possible for you to have been – you knew what kind of car he was driving.

A. Yes, sir.

Q. You could have placed him – you had placed him in surveillance after he had left work previously.

A. Yes, sir.

Q. You could have – after this warrant was executed had him placed under arrest if you found anything in the house that would have been of a – of an evidentiary value that could have been a basis of a prosecution; could you not have?

A. Yes, sir.

Q. And you could have brought him back to the residence.

A. If we could locate him, yes, sir.

Q. Or you could have let him come back to the [145] residence and had him pulled over when he got in close proximity to the residence. You could have done that, too, couldn't you have?

A. We could have, yes.

Q. But you didn't. You chose not to do that.

A. That's correct.

MR. FIEDLER: That's all.

THE COURT: Miss Buckley?

MS. BUCKLEY: Nothing, Your Honor.

EXAMINATION

BY THE COURT:

Q. When a search – did you search any of Mr. Reinholz' body cavities?

A. No, I did not, sir.

Q. Okay. With respect to the protective gear, did you have the protective gear with you?

A. Yes, sir.

Q. Where was it? In your vehicle?

A. Yes, it was.

Q. Did you make any – any plans for any protective gear for any of the other officers?

A. The other officers are not trained, nor do they have that gear issued to them until they've completed a – a 40-hour school with the DEA.

Q. What arrangements had you made with any other

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